February 1991
Question 3

For seven years, Refin has been operating a smelter within Zone A of City. A major portion of Refin's operations is the crushing of ores, which produces considerable noise and dust. City's zoning ordinance permits a smelter to operate in Zone A. Last year, several residential subdivisions, the nearest a mile from the smelter but all inside Zone A, were developed and occupied.

Residents of the new subdivisions are concerned because Refin trucks haul granular toxic chemicals in covered drums from a supply depot to the smelter on a regular basis. The only reasonable route to the smelter from the depot is over a street which borders the residential subdivisions. Recently, a cover on one of the drums was blown off by a strong wind; chemicals were scattered and, while causing no personal injuries, badly burned the lawns of four homeowners.

Refin's procedures for disposing of chemical residue also concern the residents. Employees bury the residue in containers which, because of internal chemical action, will decompose after 10 to 15 years. Chemically active materials could then invade a nearby lake, the source of the subdivisions' main water supply. The residue containers used by Refin are the most durable that are available for sealing the chemical residue.

Residents have urged City to bring suit against Refin, but City has not yet acted. However, Howard, one of those who urged action by City and whose lawn was badly damaged by the chemicals blown by the wind, has sued Refin seeking damages and equitable relief

What are Howard's rights and remedies, if any? Discuss.

ANSWER A TO QUESTION 3

I. Liability Theories. Howard's land has been damaged by chemicals from trucks transporting the chemicals to defendant's smelter, and thus, he can sue for nuisance or trespass to land.

A. Nuisance: Public or Private. There are two types of nuisance causes of action: public and private. The facts are such that Howard can sue under either theory.

1. Public Nuisance. Refin's smelter plant is causing substantial interference with the health and safety of the community at large since the noise, dust and other by-products of a smelter are widespread, and the chemically active materials Refin stores may invade the lake which serves as the source of an entire subdivision's main water supply. Normally, the City is the proper party to bring suit for a public nuisance. However, the facts state that the City has not yet acted. In certain circumstances, a private party can assert a public nuisance cause of action if he has suffered "special injury," unlike that of the residents of the community as a whole.

a. Special Injury. Howard has suffered a special injury unlike that of the other residents in that the chemicals from Refin's smelter badly burned his lawn. Only four other homeowners were similarly injured. This allows Howard to assert a public nuisance cause of action.

b. Balancing the Harm to Howard and the Harm to Refin. Because he is asserting public nuisance, the court will balance harm to community to determine if Refin's activities constitute a nuisance. The court must balance competing factors, including the utility of Refin's activities to the community, the dangers posed by those activities, and several other factors.

i) Utility of Refin's Plant. The smelter provides an important function in our economy, as we need crushed ore; however, it is not vital. The court will take into consideration the number of people employed by Refin, the impact its operations have on the community as a whole, and the harm to the community if Refin is shut down or its activities are curtailed.

ii) Zoning. The facts state that smelters were permitted under the applicable zoning ordinance in the area. Although compliance with zoning requirements is evidence that the defendant is acting reasonably and is not constituting a nuisance, it is not determinative. Even if operating in conformance

with zoning ordinances, one may still constitute a nuisance.

iii) Coming to the Nuisance. The defendant will also argue that Howard and the other landowners "came to the nuisance." In other words, the smelter had operated for seven years when the residential community was first developed. Before they bought their houses, they knew about the smelter. However, although at common law this was often a good defense, and the party who came to the nuisance was denied relief, modern courts, taking in the reality that our country is now more urban than rural and areas in which to develop residential neighbors decreasing, is less likely to place emphasis on the coming to the nuisance argument.

iv) Toxicity of Chemicals. Another important factor for the court to consider is the toxicity of the chemicals being blown onto the neighbors' lands. If Howard were only complaining about the noise and dust, his argument would be weaker. However, since the danger posed by Refin (toxic chemicals which have already burned yards and may endanger the entire area's water supply) is great, this weighs heavily against Refin's case.

v) Endangerment of Water Supply. As discussed above, since the chemicals pose a danger to the entire water supply of the area, this is a serious factor against continuing to allow refin to operate, since it would create potentially irreparable harm and certainly would be expensive to clean up and would be an administrative nightmare.

vi) Use of Due Care. Refin would undoubtedly argue it is using due care in the storage and transport of its chemicals. The containers in which it stores its residue are the most durable available, and the cover on the drum was only blown off because of a strong wind. This is evidence that the defendant is acting reasonably and using due care; however, he may still constitute a nuisance despite this fact.

c) Conclusion. Despite the fact that the residents came to the nuisance, Refin is using all due care, and is complying with applicable zoning ordinances and undoubtedly contributes to the economic well being of the community. The fact that it is disposing of toxic chemicals which pose a danger to the main water supply and has already caused substantial damage to the property in the area means that the balance will probably tip in Howard's favor, and the court should hold that Refin's activities are a public nuisance.

1. Private Nuisance. If for some reason the court holds that Howard has not suffered special injury despite the damage to his lawn, and thus does not allow him to proceed on the theory of a public nuisance, he should still be able to assert that Refin is a private nuisance because Refin's use of its property substantially interferes with the use and enjoyment of Howard's property.

a. Elements of Cause of Action. The elements of the private nuisance cause of action are the same as were discussed above, except rather than considering

the harm to the community as a whole, Howard only has his own use and enjoyment of land to balance against the activities of Refin. Thus, it is more likely in such a case that the court would find for the defendant because of the benefits of its employment and contribution to the community. However, on the facts of this case, Howard should still be able to show a substantial and unreasonably interference with his property that should be compensated for in damages or enjoined.

B. Trespass to Land. Because the chemicals from Refin's plant entered Howard's land, he can also sue on a theory of trespass to land. For this, he must show intentional entry onto his land which caused damages.

1. Volitional Act. Refin will argue there was no volitional act, but that the chemicals were only blown by the wind onto Howard's property. However, they did act to transport the chemicals on the road they knew bordered the homes.

2. Requisite Intent. Refin will similarly assert they had no intent to trespass, but that a strong wind blew the chemicals onto the land. However, if Howard can show that they were substantially certain that if a strong wind arose, the chemicals would blow onto Howard's property, that should be sufficient to establish intent. Much depends on how windy the area is and how substantially certain Refin was. Since Refin knew the road bordered the homes, there is probably sufficient knowledge to establish intent.

3. Causation. The chemicals caused the

harm. 4. Injury. Howard's land was burned.

5. Conclusion. Since Refin cannot assert consent, authority, necessity (it can argue that was the only reasonably route, but no public or private necessity exists on these facts) or defense, Refin should be found liable for trespass to land.

II. Remedies.

A. Damages. Under either theory, Howard should be able to recover nominal damages and compensatory damages to make him "whole" for all damages proximately caused by Refin's acts and which are foreseeable, certain and unavoidable. This would include the cost of repairing his lawn or the diminution in value caused by the burning.

1. Nuisance Damages. Courts are split on if they will award damages for a permanent nuisance or if they will award damages for loss of use and enjoyment of the property up to the time of the suit. Under either, Howard could recover damages for the loss of enjoyment caused up to the time of suit because of the

noise and dust, and for the damages to his lawn. If the court determines that Refin is a permanent nuisance, rather than enjoining Ref in, it may award damages for all past harm, plus the present value of the future harm that will be caused by Refin's continued operations.

2. Trespass Damages. Besides recovering for diminution in value and/or cost to repair, Howard can also try to get punitive damages since trespass to land is an intentional tort. However, since Refin did not act wilfully, there is no reason for the court to punish Refin or award punitives to deter such future conduct, and thus Howard will be limited to compensatory damages to make him whole. The damages to his land are all foreseeable results of Refin's activities, certain in amount, and were unavoidable. Therefore, he will get all damages proximately caused by Refin's act.

B. Injunction. As a general rule, when a party has been harmed by a nuisance, especially a public nuisance, they want equitable relief of an injunction. The requirements for an injunction appear to be met in this case, as discussed below.

1. Tort. Howard can base his action for an injunction on the nuisance or trespass cause of action. He should be able to establish liability of Refin for both.

2. Inadequate Legal Remedy. Because of the way in which the law and equity courts evolved in England, before a court will award an injunction, it must first determine that the party's legal damages remedy is inadequate. This is no problem where, as here, land is involved, since land is considered unique.

Also, this involves multiplicity of suits and continuing harm, since if Refin is not enjoined it will continue storing the chemicals and creating hazards to the water supply, hazards in that winds may again cause chemicals to blow on the plaintiff's land, and that noise and dust will continue. Thus, Howard's legal remedy is inadequate.

3. Feasible. The court would have no problem prohibiting Refin from operating -- it would not require court supervision at all. Thus, an injunction decree would be feasible.

4. Balance. Traditionally, courts refused to balance in cases of nuisance since they had already balanced the harms and benefits in order to determine that the defendant was a nuisance, and thus awarded the injunction without further balancing. However, modern courts will still use this step in the procedure to again balance the harm to Howard if an injunction does not issue versus the harm to Refin if an injunction does issue. However, once again, this should balance on Howard's favor.

5. Property Right. Howard is seeking to enjoin damage to his land, thus he has a property interest. Traditionally this was required, although modernly even if Howard did not have a property right, they would still issue an injunction by reading the requirement liberally or disposing of the requirement.

6. Defenses. This does not involve prior restraint in violation of the First Amendment. Howard does not appear guilty of unclean hands in regard to this transaction, no crime is involved, and Howard timely sued and thus is not barred by laches or by the Statute of Limitations.

7. Conclusion. Accordingly, since all the requirements for an injunction have been met on these facts, the court should issue an injunction to enjoin Refin's activities.

ANSWER B TO QUESTION 3

I. HOWARD'S RIGHTS

A. PRIVATE NUISANCE

Howard may sue Refin on the theory of private nuisance, alleging that the acts of Refin cause considerable impairment to the use and enjoyment of his land, and have damaged his lawn (by chemicals blown on his lawn when the cover of one of Refin's drums came off).

To succeed on an action for private nuisance, the plaintiff bears the burden of showing that the harm he suffered was such that it substantially impaired his use and enjoyment of his own land. Nuisance is an intentional tort. However, intent may be inferred from the acts of the defendant.

In this instance, Refin has been operating the plant for seven years and has been operating within the City's ordinance, which permits the operation of the smelter within Zone A. The residential area in which Howard lives -- a mile from the smelter -- is still within Zone
A.

Refin's argument that it was in operation prior to the development of the subdivision and that the residents "came to the nuisance" will have some influence on the court. The fact that it has been operating the smelter for seven years, and is within the zoning permits of the City, will also have bearing on the court. The court will also look at the fact that Refin may be a valuable source of jobs in the area. Therefore, it would have to balance the harm done by Refin against the personal interest of Howard.

However, Howard has suffered personal damages to his lawn (by the chemicals) and may seek damages and possibly an injunction against Refin for these damages.

Howard may sue Refin on the theory of a public nuisance if he can allege that the damages he suffered were different in kind than those suffered by the general public.

In this instance, the facts show that residents have been complaining because of the noise and dust, and that because of a cover coming off one of the drums, chemicals were scattered on lawns, burning four of them.

Howard has suffered injury different in kind from the general public at large in that his lawn was badly damaged by the chemicals blown by the wind. Howard may be successful in an action alleging pubic nuisance because of his lawn damage.

C. THREAT OF FUTURE HARM

Howard may allege that not only has his lawn been damaged, but that the procedures used by Refin for disposing of the chemicals concern not only him but other residents as well. The wastes are buried in containers which decompose after 10 to 1 5 years. At this time, the residue could escape into the nearby lake, contaminating the water source. The lake is the major water source for the subdivision. While Refin's argument is that the containers are the most durable available, on balance, the interests of the community at large could be deemed to outweigh the benefits of the smelting.

The exposure of the citizens to the chemicals may have long reaching effects, such as causing cancer or other illnesses.

REMEDIES

Damages

Howard may sue on a private nuisance theory and recover damages for all injuries proximately caused by the nuisance. He may recover costs in attempts to abate the nuisance. His damages include compensatory damages for the damage to his lawn and for mental annoyance associated with the nuisance. He may claim diminished value of his land if the nuisance persists. If it is on a temporary basis, he may claim the market value of a strip of land which is affected by the nuisance. He may recover on a public nuisance by a showing that his damage is unique.

Restitution

Howard may recover on a theory of restitution, claiming unfair benefit to Refin at his prejudice.

B.

PUBLIC NUISANCE

Injunction

The remedy of an injunction is available to Howard for nuisances which are continuing in nature, and for which an adequate remedy at law cannot be obtained. As land is unique and the likelihood exists for a multiplicity of suits, it is possible that Howard may obtain an injunction if he can meet the qualifications of an injunction.

INADEQUATE REMEDY AT LAW

An injunction will issue when there is likelihood that the nuisance will continue and that there is inadequate compensation for the plaintiff because of the length, intensity of the nuisance, and because of the fact that land is unique. It looks as if the nuisance will continue and cause permanent damage to the area.

PROPERTY RIGHTS

Howard has a valuable property right in his land, and his use and enjoyment have been substantially interfered with because of Refin's operations. Thus, he could demonstrate that this right on balance should be protected by an injunction to cause Refin to cease its activity.

FEASIBILITY

Courts do not like to issue an injunction if it is not feasible to enforce it. Mandatory injunctions require the court to supervise them. Thus, a prohibitory type of injunction which states that Refin is not to engage in any activity which would pollute the air and water and cause excessive noise, may pass the court's scrutiny.

BALANCE

Courts will balance the interests of the one seeking an injunction against the interests of the offender to see if there is more on balance for the plaintiff than for the offender. In this instance, the threat of future harm to all the residents, including Howard, seems such that it could issue an injunction. The court would have to balance the business interests and the economic threat to the community if the businesses were not in operation -- how many jobs would be lost -- against the interests of Howard.

Even though Refin was in the area first and has been in compliance with the zoning ordinance, the company could conceivably lose on an injunction when balanced against the damages to Howard and the future damages to the community.

DEFENSES

Refin will argue that it was in compliance, that it has been operating the smelter for seven years and that it is in compliance with the zoning ordinances. It will also argue that the residents "came to the nuisance." This argument will have some impact upon the court. However, on balance, it appears that even though Refin used the most durable container for sealing the chemical residue, and took the only reasonable route (an easement by necessity from the depot across the street bordering the residential section), Howard may have a viable cause for an injunction. Howard may sue individually or as a member of a class, claiming the following if he entertains a class action:

1. Typicality. His claims are typical of the class as a whole.

2. Commonality. The complaints of Howard have sufficient common law and

fac
ts.

3. Numerosity. The claims are too numerous to be joined in a joinder action.

4. Representative. Howard is a proper representative of the neighbors as a whole

in bringing this lawsuit.

If the action is brought as a class action, it will have to be certified and notice given to all members. Plaintiffs may sue for attorney fees on a nuisance action.

CONCLUSION

Howard may sue individually on a private nuisance theory and on a public nuisance theory if he can demonstrate that his injury is different in kind from that of the public at large. He may sue as a member of a class, claiming that he is a proper class representative. He may recover damages for all those damages proximately caused by the nuisance which are reasonably certain, proximately caused by the nuisance, and not too speculative. He may recover punitive damages for malice. His damages include diminished value of his land if the nuisance is permanent.

Because of the danger of the permanence of the nuisance and the threat of future harm in the manner of the contaminated water, Howard may be successful in bringing a class action asking for an injunction. The threat of water contamination is real and it threatens a large number of people. Even though Refin's procedures are "the best available," they may not be enough when balanced against the health and welfare of a large number of people. He should be successful on an injunction to stop the activities of Refin, or at least the disposal methods. He will no doubt be successful overall in obtaining an injunction. He does not have to post a bond and have a hearing.

July 1992
Question 6

Peter owned a sporting goods store. He learned that American Building Company (ABC) was about to construct a shopping mall in his city. Desirous of expanding his business, he approached ABC to arrange to rent a small space in the proposed mall. A lease agreement for a small store to be located in the East Wing of the mall was signed by Peter and ABC on July 1, 199 L Although the dimensions of the space and its proposed rent are recited in the agreement, no provision is made for an exact date when the space would be completed and ready for occupancy. The agreement explicitly leaves the determination of when the East Wing of the mall will be built to the judgment of ABC.

On August 1, 1991, Peter learned through a newspaper column that ABC had agreed with a toy company to lease to it the entire East Wing of the mall, including the area where Peter's store would have been located. Feeling that he had a valid contract, Peter took no immediate action; he thought that ABC would eventually accommodate him either by extending existing plans for that part of the mall or by offering him alternative space elsewhere in the mall.

In March 1992, Peter inquired of ABC when he might expect his space to be ready for occupancy. He was informed that ABC had changed its plans and was in the process of building a structure in which it would rent space in the East Wing to four or five major lessees, not including Peter, and that there would be no space elsewhere in the mall for Peter.

In an action by Peter against ABC in state court in State X, Peter has obtained an ex parte temporary restraining order halting construction.

1. Is Peter entitled to a preliminary injunction against ABC restraining it from proceeding with construction based on the changed building plans? Discuss.

2. Can Peter eventually force ABC to build and lease to him a space as described in the lease agreement of July 1, 1991? Discuss.

ANSWER A TO QUESTION 6

I . Preliminary Injunction

An injunction is an equitable remedy. Thus, injunctions are difficult to obtain, especially when the remedy affects others (as in this case, where construction would be halted and affect numerous workers, future tenants, etc.).

A preliminary injunction may last several months or a year, and is thus much more drastic than a temporary restraining order, which only lasts a few days. Because of this, the other party (defendant) must receive notice, and the court will balance the interest at stake and consider the plaintiff's (P) likely success on the merits.

A. Balancing

When balancing the interests at stake, the court will consider more than simply the defendant's pecuniary interests. In this case, the court will consider the potential harm to ABC's construction workers and future tenants, as well as the potential harm to ABC that will be caused by halting construction. The potential for harm here seems both large and far reaching.

Against this, the court will balance the potential harm to P if construction is not halted. Here, the harm may be irreparable if the mall is designed in such a way that ABC cannot possibly lease space to P even if P eventually succeeds in his specific performance action.

It is difficult to say which side wins in this balancing, although courts tend to balance in favor of the plaintiff. Thus, P may successfully satisfy this preliminary injunction requirement.

B. Likelihood of Success on the Merits

The court will also consider the likelihood of P's claim succeeding on the merits. There are several things which the court must consider here.

1. Valid Contract

There must be a valid contract in order for P to succeed. A valid contract requires mutual assent, consideration, and no defenses.

Mutual assent is an offer and acceptance, which are evidenced here by the lease agreement. There is also consideration because this is a bargained-for exchange between P and ABC in which both incurred legal detriment (complying with the lease).

There do not appear to be any defenses here. The contract was in writing, as required by the statute of frauds for contracts involving an interest in land. The statute of frauds requires that the contract identify the subject matter and the parties to the

contract, recite the consideration and terms, and be signed by the party to be charged. All the requirements are satisfied here.

The fact that the contract does not specify a particular date for performance is not fatal. The court may supply this material term in a reasonable way.

2. Has the Contract Been Breached?

There must be a contract breach in order for P to succeed on the merits of his case.

a. Time of the Essence

As discussed above, there was no date for performance specified in the contract. Thus, time is not of the essence in this contract. Such a requirement must be specified in the contract or communicated to the other party, and neither of these occurred here. Thus, the court will infer a reasonable time for performance. So far, nine months have elapsed since P and ABC signed the contract. This seems a reasonable time to build a large mall. Thus, ABC is not in breach for lack of timelines.

b. Anticipatory Repudiation

When one party anticipatorily repudiates a contract, the other party is entitled to: (1) suspend his own performance, (2) wait a commercially reasonable time, (3) pursue all breach remedies immediately, and (4) ask the other party to perform.

An anticipatory repudiation occurs when one party makes clear, from words or conduct, that it is not going to perform the contract. This repudiation occurred in March when ABC told P there would be no space in the mall for P. Thus, P is entitled to pursue any breach remedy.

The August newspaper column probably did not qualify as an anticipatory repudiation because ABC's repudiation was not made clear at that time. However, it did give P reasonable insecurities about ABC's performance.

P would have been entitled to demand adequate assurances in writing from ABC that it intended to perform. P would have been entitled to suspend his own performance while awaiting ABC's assurances, and could have considered ABC's prospective inability to perform to be an anticipatory repudiation if ABC did not send such assurances in a reasonable time.

3. Can P Get Specific Performance?

The final issue the court will consider when determining the likelihood of P's success on the merits is whether P can obtain specific performance of his contract with ABC. This is discussed below.

4. Specific Performance

Specific performance, like a preliminary injunction, is an equitable remedy. There are five factors a court will consider before granting specific performance:

a. Are legal remedies inadequate?

b. Is the contract definite and certain?

c. Is specific performance feasible?

d. Is this remedy mutual?

e. Are there any defenses?

Inadequacy of Legal Remedies

The legal remedy for a contract breach is damages. Expectation damages are awarded to give the injured party the benefit of the bargain. However, damages must not be speculative; they must be sufficiently certain.

In this case, P could not obtain damages because they would be too speculative. His business already exists, but it would be impossible to determine how successful, if at all, it would be in this new mall.

Restitution would not make P whole, either. In restitution, P may recover any benefits conferred on the other party under a quasi-contract theory. Here, it does not appear that P conferred any such benefit on ABC.

Hence, P's legal remedies are inadequate. Damages are too speculative to recover, and he cannot use restitution. In addition, land is unique. Since this was a contract for an interest in land (a lease), the legal remedy is inherently inadequate.

Definite and Certain Terms

Equity requires that the contract clearly express the intention of the parties in definite and certain terms. A contract may be sufficiently certain to be binding in the parties, yet lack the certainty required by equity.

ABC may claim that the lease lacks the requisite specificity since it did not state a

performance date or describe the exact location of the leasehold. Given ABC's unequivocal repudiation and the fact that a court could easily supply reasonable terms for these missing elements, a court will probably rule against ABC and find that the lease is adequately definite and certain.

Feasible

Enforcement of the contract by specific performance must be feasible. Courts prefer negative injunctions because they are easier to write and enforce, but the court here would have to mandate specific behavior rather than forbid it.

In addition, ABC may argue that this is really a personal services contract because construction is involved. Personal service contracts are not enforceable by specific performance because supervision by the court is not feasible.

Here, however, the true issue is providing space for P rather than supervising the construction itself. Thus, specific performance is feasible here.

Mutuality

Courts used to require mutuality of remedy here before awarding specific performance. Mutuality exists here because ABC could exercise this remedy against P if P breached the lease.

However, the new test is security of performance. Can the court be sure that P will perform if it orders ABC to perform? It seems that the court has such security given the fact that P already owns the store, so this is not a speculative business venture. If the court is worried, it can require P to deposit some lease payments with the court before granting specific performance.

No Defenses

ABC's only potential defense is [aches. P learned of ABC's possible intention not to perform the contract in August of 1991, yet did nothing until March of 1992. This behavior could be seen to have allowed ABC to continue to its detriment. ABC may win in this argument, and P will not get specific performance.

ANSWER B TO QUESTION 6

Preliminary Injunction

In order for Peter (P) to obtain a preliminary injunction, he must demonstrate to the court that he has met the requirements for this form of remedy.

Underlying Basis for Injunctive Relief.

P must show that he has some interest that has been violated by ABC to which he is entitled relief.

P should argue that the lease agreement between P and ABC on July 1, 1991 was a valid contract binding upon the parties and this gave P a property interest as well

as a remediable position as an aggrieved party for breach of contract.

Formation of Contract.

The requisite mechanics of offer and acceptance seem to be present. There is an issue relating to the definiteness of the terms and possibly a statute of frauds argument, but this will be addressed in the Defenses portion of the Specific Performance analysis.

Conditions.

One term of the contract allows ABC to determine the date of construction. This is a condition to P's entering into possession of his leasehold. However, the condition is to when and not if P can enter into the premises. Thus, any argument by ABC that a condition has not been met is invalid, so there is no contractual obligation.

Breach.

ABC impliedly breached the contract with P on August 1, 1991 by agreeing with the toy company regarding leasing the East Wing. P heard from a reputable source, the newspaper, about disclosure of the agreement. P could have brought a cause of action for the anticipatory repudiation, but waited for ABC to cure its breach. ABC expressly breached the contract in March of 1992 by ABC's informing of the new building plans.

P has a cause of action which should be remedied by the court.

Inadeauacy of Legal Remedy.

P must show that money damages are inadequate to compensate his injury.

P will argue that money damages as to lost profits or "cover" rental value are too speculative., Although P is a veteran owner of a sporting goods store, potential profits in a new shopping mall, coupled with the uncertainty of when the actual lease term commences, are too speculative. There is no liquidated damage clause and ABC does not appear likely to remedy P at all.

P will further argue that he has a property interest in the location of his new leasehold. This fact may make money damages presumably inadequate.

P should further argue that he will suffer irreparable injury if he is not granted the injunction. The construction would proceed without allowing him a spot in the East Wing. It may be too late if the preliminary injunction is not granted.

ABC would argue that there is no irreparable injury. Maybe ABC would offer an alternative space for P to substantially comply with the lease, but those facts are absent.

Feasibility.

A court must be able to effectively enjoin an action. The court has no jurisdictional problem because the property is located within State X. Furthermore, the court will be issuing a prohibitory order which would be easier to supervise than a mandatory injunction.

Balancing of Hardships.

The court needs to balance the hardships to the defendant if an injunction is improperly granted versus plaintiff's harm. On the one hand, ABC will argue that stopping construction will result in delayed costs, lost profits and disgruntled clients and lessees. However, ABC

has already waited nearly a year before finalizing its building plans.1 Also, there are no facts showing that ABC has made a commitment date it must meet.

On the other hand, the injury to P would be great. He would lose his interest perhaps permanently and not be able to fully be compensated for the wrong he suffered.

Property Right

Under common law, a plaintiff must possess a property right. Since the subject matter is a lease interest, P satisfies this right.

Under modern law, this requirement has generally been disposed

with.

Defenses.

There seem to be no applicable defenses for ABC against P except delay on P's part or a statute of frauds defense. These will be discussed in the Defenses for Specific Performance portion of this essay.

Specific Performance

Following the injunction, P should seek to compel ABC to build and lease to him the space pursuant to the July lease agreement. There is another set of requirements P must meet in order to be granted specific performance.

Inadequacy of Legal Remedy.

Here, please incorporate by reference the discussion under the Injunction analysis.

In addition, P should argue that the delay he suffered waiting for ABC's action is immeasurable. Furthermore, it will be hard to assess how much P is entitled to in damages if his lease is not enforced.

Definiteness of Terms.

P has to show the terms are definite enough to be specifically enforceable. The lease provided for the dimensions and rental value. However, it lacked any agreement on the duration of the lease or the commencement date.

These are not insurmountable problems. ABC and P could easily agree to the duration, and commencement could begin upon completion of P's space.

ABC will also argue that the exact location of the space is indefinite. The lease provided for a spot in the East Wing which is against ABC's present plans. The court could compel strict adherence to the East Wing, or since P is willing to change the location somewhere in the mall, resolve it that way.

1 Moreover, ABC has kept changing its mind regarding lessees: Peter --> toy company -- other lessees. A further delay caused by the injunction is consistent with ABC's actions.

Unless the court requires strict definitiveness, P should be able to meet this showing.

Feasibility.

The problem of forced Supervision arises with construction contracts. Courts are reluctant to specifically enforce construction because of supervisory hassles and the flavor of involuntary servitude. The court does not have the resources to insure that the construction is being maintained properly. Thus, for this reason, specific performance may not be available for P.

Mutuality of Remedy.

At common law, the remedy of specific performance had to be mutual. Could ABC compel the court to enter the lease? Probably not, because damages would be easier to assess.

At modern law, the mutuality requirement is largely abrogated.

Defenses.

ABC should argue that the contract is void due to the statute of frauds problems. The area of the property was not described in definite enough terms and since a valid content requirement is missing, the contract should be void. This defense may be strong enough to overcome the contract.

Laches.

ABC should argue that P had an unreasonable delay. P knew that ABC had impliedly breached, but did not act. P should argue good faith belief in the validity of the contract and ABC's wrongdoing.

July 1995

Question 4

A woman who identified herself as Smith brought an auto into Carson's Auto Repair Shop (CARS) for repairs. CARS completed the repairs for $5000, which is a fair price for the work done and the parts and materials supplied. The day the repair work was completed, police informed CARS that the auto had been stolen by Smith and that Brown was the owner. Police took possession of the auto and returned it to Brown. CARS has not been paid and Smith has disappeared.

Brown did not have insurance on the auto. A week after recovering the auto, Brown sold it and transferred title to Jones for $8000, the fair market value of the auto in its repaired condition. Brown deposited the $8000 in his bank account, bringing the balance in the account to $22,000. A week after making that deposit, Brown withdrew $20,000 and lost it all gambling. One day later, Brown won $1000 in the state lottery and deposited that amount into his bank account. No other changes in the account have taken place.

What remedies, if any, does CAR have:

1. Against Brown? Discuss.

2. Against Jones? Discuss.

ANSWER A TO QUESTION 4

I. Remedies Against Brown

Generally, a court will try to order damages. If this remedy is unavailable, equitable remedies, including restitution or an injunction may be appropriate.

A. ___ Damages

Brown had no contract with CARS. His car was stolen by Smith, who then took it to CARS for repairs. A court is unlikely to find that an implied contract between Brown and CARS existed here, since Brown himself never manifested an intent to enter into such
a contract with CARS.

Neither has Brown committed any tort against CARS - he was not negligent, nor did he engage in any intentionally tortious conduct against CARS.

Because there are no contract and no tort, damages will be an inappropriate remedy. Brown's conduct did not cause CARS to lose money. Smith's wrongful action was the direct and superseding cause of any loss to CARS.

B. ___ Restitution

Unjust Enrichment

Although there was no contract between Brown and CARS, he has been unjustly enriched by CARS having repaired his car. After the repairs, the car was sold for $8,000. Presumably, the car was worth much less than this before CARS' work, which cost CARS (or for which CARS charged) $5,000.

A restitutionary remedy is designed to restore to the plaintiff the value he has conferred upon the defendant. CARS conferred a $5,000 benefit upon Brown - the value of the work it did. Alternatively, the value of the benefit could be calculated by determining the amount of money by which the value of the car increased after the repairs. For example, the car may have been worth only $1,000 before the repairs, but after the repairs, the fair market value was $8,000 (evidenced by the sale to Jones). If this calculation was used, CARS might be entitled to the full benefit it has conferred on Brown, which would be $7,000. But because this exceeds what CARS originally would have charged, CARS would probably be limited to a $5,000 recovery.

The problem with a recovery under an unjust enrichment theory is that Brown took the proceeds from the sale to Jones, put them in his bank, but then gambled most of them away.

CARS will therefore have to trace the $5,000 benefit it has conferred upon Brown and attempt to get other remedies.

Construction Trust

When the defendant has title to goods or money that is traceable to an uncompensated (wrongful or unjust) benefit conferred upon plaintiff by the defendant, the defendant may be able to get a constructive trust placed on the plaintiff's acquisition.

Under normal circumstances, therefore, CARS would be able to get a constructive trust on the proceeds of the car sale (up to $5,000), which would require Brown to convey this money to CARS in due course - Brown would be the equitable trustee of the $5,000.

The problem here is that Brown has commingled the $8,000 with his personal funds, and then lost most of the money in gambling.

Lowest Intermediate Balance

When the defendant places the proceeds in a bank account and then withdraws the money, the plaintiff is entitled to a constructive trust only to the amount of the lowest intermediate balance of it in the account. This happens because courts presume that the plaintiff spends his own money first, before using the money that should be considered part of the constructive trust.

In this case, Brown's lowest intermediate balance was $2,000, since he lost $20,000 of the $22,000 in the account by gambling. Therefore, CARS will be able to get a constructive trust on these funds for $2,000.

Replenishment

When the defendant replaces money into the account, some courts will hold that the defendant had a constructive intent to replenish the funds that should have been part of the constructive trust.

Here, Brown deposited $1,000 of his state lottery winnings into the account the day after the $20,000 loss. If a court follows the replenishment theory, CARS will be able to get a constructive trust in the amount of $3,000.

Equitable Lien

CARS might also be able to get an equitable lien on any other assets of Brown up to the value of $5,000. CARS shouldn't be able to get the lien on the car, however,

since a lien requires the defendant (here, Brown) to have title - but he sold the car to Jones.

Nevertheless, a generous court may be willing to grant CARS an equitable lien on any of Brown's other assets in the amount of $5,000. The problem, however, is that this would subject these other assets to a lien even though these other assets were totally unrelated to the benefit conferred on Brown. This remedy is therefore probably inappropriate, and the constructive trust would be better.

At the very least, though, CARS should be able to also get an equitable lien on the $3,000 left in the bank account.

Replevin

Replevin allows the successful plaintiff to take back any property wrongfully retained by a defendant. Unfortunately, CARS never had proper legal title to the car, nor does Brown continue to have title - he sold it to Jones, who is presumably, a bona fide purchaser for value with no knowledge of the CARS repairs. Replevin is therefore inappropriate.

C. __ Injunction

Because Brown has already sold the car to Jones, injunctive relief does not appear appropriate. There is simply nothing to enjoin. Of course, if a constructive trust is imposed, Brown will be unable to remove (legally) the $3,000 (or $2,000) from his bank account.

11. __ Remedies Against Jones

As noted above, Jones is presumably a good faith bona fide purchaser with no knowledge of the work CARS did on the car. He has already paid a fair price for the car.

A. __ Damages

Damages against Jones are inappropriate because he had no contract with CARS, nor did he commit a tort against them.

Moreover, if damages were awarded against Jones, it would be manifestly unfair, since Jones would then be paying far more for the car than it was worth - he has already paid $8,000, a fair price, to Brown. Damages would mean that Jones would be paying twice, so they won't be awarded.

B. __ Restitution

Unjust Enrichment

Jones has not been unjustly enriched because he has paid the full fair market value of the car to Brown - $8,000. Therefore, the benefit of the repairs was conferred on Brown, not Jones.

Replevin

Because CARS never had legal title to the car, and because Jones has proper title and was a bona fide purchaser for value (without notice), CARS will be unable to get the car back.

Constructive Trust

This remedy is inappropriate against Jones because he was a bona fide purchaser in good faith, for value. Moreover, a constructive trust on the car would again raise the problem of double payment by Jones - he has already paid $8,000, and shouldn't have to pay more.

Equitable Lien

This remedy would be more appropriate, since Jones has legal title to a car whose increased value is directly traceable to CARS' repairs.

Once again, however, Jones' status as a bona fide purchaser should prevent CARS from getting an equitable lien on the car or on any of Jones' other assets. Such a remedy would also cause the double payment problem mentioned above.

C. Injunction

Once again, this remedy - a court order requiring Jones to do or refrain from doing something - is inapplicable. Specific performance, available as a contract remedy, is also inappropriate since Jones had no contract with CARS.

D. Conclusion

CARS should not be entitled to any remedies against Jones because he was a good faith bona fide purchaser for value. In the chance event that Jones is somehow held liable to CARS, he would be able to seek indemnity from Brown, upon whom the benefit of repairs was really conferred.

ANSWER B TO QUESTION 4

1. CARS v. BROWN

CARS did $5,000 worth of work on Brown's car. The problem is that the work was contracted for by Smith, who had stolen the car. Brown never requested any repairs for his car. However, Brown did recover the car in its repaired state. Another complicating factor is that Brown has sold the car to Jones.

Damages

CARS is not entitled to damages because it has no legal claim against Brown. Brown never ordered any work done by CARS. Nor did anyone act as Brown's agent to have work done. In order for an action for damages to lie, there must be some legal

claim. Therefore, CARS may not recover damages. However, CARS does have several claims in equity.

Quasi Contract

CARS conferred a benefit on Brown by repairing his car. If Brown is not required to pay CARS for this benefit, he will be unjustly enriched. Therefore, even though there was no actual or implied contract between CARS and Brown, a court sitting in equity will find a quasi-contract between the two, in order to prevent the unjust enrichment. CARS is thus entitled to restitution from Brown.

Restitutionary Remedies

The form of CARS remedy will be limited by the fact that Brown has sold the car to Smith. CARS can thus reach only the money Brown has. No right of replevin or mechanics lien is possible without the car. CARS will want to reach the specific money Brown got from the sale of the car, because he has the chance to gain the position of a secured creditor in that property. CARS has two options: constructive trust and equitable lien.

Constructive Trust

Had Brown not sold the car, CARS would not have been able to use the constructive trust remedy. This is because the remedy, when granted, means that the defendant holds the wrongfully acquired property as a trustee for the plaintiff. As a trustee, his only duty is to convey the property back to the plaintiff. However, where the unjust enrichment consists of improvements to defendant's property (or money taken which is then spent on improvements) it is not appropriate to convey the entire property to plaintiff.

Thus, where as in this case the unjust enrichment consists of repairs to a car, it would give CARS too great of compensation and wrongfully penalize Brown if he had a constructive trust imposed on the car itself.

However, Brown has sold the car to Jones in exchange for cash. CARS could argue that the benefit it conferred on Brown is no longer inseparable from Brown's lawful property. Instead, the repairs have been transformed into cash (we are told that Brown sold the car for $8,000, the fair market value of the car as repaired).

Commingling of Funds - Lowest Intermediate Balance

Therefore, CARS can claim a constructive trust on $5,000 of the $8,000 Brown put into his bank account because this money can be traced directly to the sale of the car. Unfortunately for CARS, this money was commingled with Brown's own funds and most of the money was subsequently withdrawn and squandered.

The fact that Brown had $14,000 in the account first is not a problem. Where a constructive trust is imposed on commingled funds, it is presumed that if the

defendant withdraws some of these funds, he has withdrawn his own money. Therefore, when Brown lost $20,000 gambling, it is presumed that the $2,000 remaining in the account belongs to CARS.

The sticky point is the deposit of the additional $ 1,000. This is not presumed to belong to CARS. In fact CARS can only reach this money if it can prove Brown intended for it to replace money belonging to CARS. Thus, CARS is limited to a constructive trust on the lowest intermediate balance of $2,000.

Furthermore, if CARS elects to use constructive trust, it cannot reach Brown's other assets to cover the deficiency. This is because CARS is claiming the specific property placed into the account. However, if Brown had used the $5,000 to purchase stocks and these had appreciated, CARS would have been entitled to the full appreciation.

Equitable Lien

This remedy is appropriate where the unjustly enriching property cannot be separated from the defendant's rightful property (such as car repairs). Therefore, an equitable lien is appropriate here. Especially if the court will not accept that the sale of the car transformed the indivisible improvements into divisible cash.

An equitable lien grants the plaintiff a security interest in the wrongfully acquired property, or property traced to it. Thus, CARS would be granted the position of a secured creditor in $5,000 of the $8,000 placed in Brown's account. However, the rules for lowest intermediate balance still apply, so the secured position would in this case be limited to $2,000.

However, in contrast to a constructive trust, the equitable lien allows the recovery of the exact amount of unjust enrichment, no more, no less. Thus, CARS can still get an unsecured interest in Brown's other property in the amount of $3,000.

injunction

An injunction is not appropriate here because there is no conduct to mandate or prohibit, and because CARS has adequate alternative remedies.

2. CARS v. JONES

CARS has no remedies against Jones. Jones paid $8,000 for the car, which was its fair market value as repaired. This makes Jones a bona fide purchaser for value. CARS, therefore, cannot recover anything from Jones.

Had Jones paid less than fair market value and if he had known that Brown had not paid for repairs done by CARS, then he would not be a bona fide purchaser. In this case, CARS could probably get a mechanics lien as an equitable lien on the car, as

described above.

February 1997

Question 3

Debbie purchased an ocean front vacation house located on Lot #1. Shortly

thereafter Peter purchased the ocean front house located on adjoining Lot F2. The houses and lots are comparable in size, value and age.

After his purchase, Peter hired a surveyor to lay out the boundaries of Lot #2. The surveyor reported that a portion of the porch of Debbie's house is on Peter's property. In particular, her 10-foot wide porch extends laterally 7 feet onto Peter's property. The encroachment was made by the original developer 25 years before Debbie and Peter purchased the properties.

Six months after learning of the encroachment, Peter commenced an action to compel Debbie to remove the porch from his property.

1) How should the trial court rule on the merits of Peter's action? Discuss.

2) If the trial court issues a mandatory injunction requiring Debbie to have the porch removed within 30 days, but Debbie does not comply, what procedural steps should Peter take to make her comply and what should be the result? Discuss.

3) If the trial court concludes that Debbie wilfully disobeyed the injunction and fines her $1,000, but on Debbie's appeal the appellate court concludes that the injunction should not have issued, how should the appellate court rule on whether Debbie must pay the $1,000 fine? Discuss.

4) If Peter had not commenced his action until one year after his discovery of the encroachment and Debbie had moved to dismiss the action because of this delay, how should the trial court rule? Discuss.

ANSWER A FOR QUESTION 3

This question involves possession and adverse possession of real property, and the remedy of injunction and its particularities.

1. How should the court rule on the merits of Peter's (P) action?

The merits of P's action cannot be fully determined given the lack of facts as to who owned the two lots in question prior to Debbie (D) and P purchasing them. Assuming that the developer sold both lots and the homes on them sometime shortly after development (a likely scenario) then the issue of whether D owns a portion of P's lot by adverse possession is paramount.

Adverse Possession: The owner of real property has the right to exclusive possession to the land and the right to exclude others among the bundle of sticks commonly contained in a landowner's rights.

The concept of adverse possession is designed to promote the productive use of land, and serves as a bar to a claim in ejectment or for trespass from the legal owner. It is possible to acquire title to land by adversely possessing it. The requirements are: open and continuous possession; exclusive possession; actual possession, notorious possession and possession in a manner hostile to the true owner. These acts must continue for the requisite statutory period.

Tacking of one adverse possessor's interest onto one who takes the land after them is usually allowed.

These facts indicate open and continuous possession of the 10 foot wide porch by 7 foot wide deep portion of Lot #2. D and all previous owners have unfurled their flag and let it fly by building a structure thereon. Given that there are no facts to support an inference that Lot #2 owners allowed this structure to exist with permission (creating a license rather than adverse possession) satisfies this requirement. The hostility requirement is also satisfied given the structure and the fact that it implies a claim of right as against all others to the land in question.

The final issue, that of possession for the statutory period is unclear. First, there is no indication what the statutory period is. Some states allow 10 years, others 20 - and most states also shorten these periods if adverse possession is under color of title (pursuant to a written instrument purporting to grant title). The color of title issue is not applicable here.

Assuming all these requirements are borne out by the law and the facts developed at trial, P would lose his claim and his title interest in the portion of Lot #2 in question.

If the AP is not satisfied D might also argue that she has an implied easement for the porch structure. There are numerous types of easements, including express

easements by grant or reservation (no facts to support); easements by prescription (see above); and implied easements including easements by necessity.

An easement is merely a right to use the land of another, and so while D would not get title she might claim an implied easement allowing her to use the land upon which the porch is built. This would be an implied easement for the porch if it was apparent, and continuous because it was apparently created by the original owner of all the land (the unitary tract requirement). It also appears to be reasonably necessary for D to enjoy the use of her land. This is fairly weak, however.

D could also argue that because of the fact that the developer owned both tracts, he may be said to have reserved a "porch easement" for himself. This might work if he built the porch on #1 and then sold #2, reserving the easement in some express manner. The facts do not support this.

Remedies: There are three basic types of remedies for torts: damages, restitution; and injunctions. When land is involved an injunction is often appropriate where legal money damages would be insufficient to make the P whole.

The requirements to grant an injunction are: the legal remedy must be inadequate; there must be a property interest at stake (although courts now extend this to important personal rights or interest); the injunction must be feasible in the sense that it does not require too much court supervision, and negative injunctions are thus preferred (an injunction requiring the enjoined party to refrain from encroaching, for example); the court will usually balance the hardships of the parties (with exceptions for intentional encroachment or public nuisances); and there must be no defenses available to make granting of the injunction inappropriate.

As noted, the legal remedy appears inadequate since land is involved and there encroachment is ongoing. A property interest (P's interest in Lot #2) is involved. This injunction is feasible, as the court need only require D not to encroach on Lot #1 by requiring removal of the porch (it is arguable that this is really an affirmative injunction, e.g. remove your porch).

In terms of balancing hardships, it appears that the encroachment was not intentional, this requiring a balancing. The facts are unclear as to the cost to D to remove the porch, the usefulness of the land in question to P's enjoyment of his lot and other such issues. It is quite possible that the court could find D's hardship extreme, especially if it would require great expense. It may make more sense for a court to order D to pay P fair market value for the land being possessed (assuming the adverse possession claim has failed).

Defenses to the injunction will be discussed, infra.

2. What should P do if D does not comply with the courts order?

In the event D does not comply with the court's order regarding the removal of the porch, P should do a number of things. First, P should file a motion for D to show cause as to why the order is not being complied with. Failure of D to answer this motion in a timely manner should result in P seeking a contempt order against D. Contempt may be both civil and criminal in nature. Civil contempt occurs when the contemnor holds the keys to the jail in her own pocket - D must merely comply with the court order and avoid the contempt sanction. If criminal contempt is imposed, it is to punish a wrongdoer for past acts. Under some circumstances extra procedure must be allowed before levying of serious criminal contempt sanctions.

P might also seek a court order allowing him entry onto D's land to remove the porch, or to allow sheriff's officers to enter the land to assist in or keep the peace during such a situation. The court should find D in contempt.

3. How should the appellate court rule on the trial courts finding of a willful disobeying of the court ordered injunction?

The appellate court should apply the collateral bar rule to the contempt sanction even if they find the injunction was inappropriately issued. This rule requires one to comply with court orders regardless of whether they are perceived as being invalid under the law. Parties must abide by court orders despite any likelihood of success on appeal until such time as the trial court lifts its order or the appellate court overturns the order. In this case D failed to comply with the order, and was held in contempt via a $1,000 fine. Her failure to abide by the court order allows the trial court to hold her in contempt in most situations.

While this rule preventing parties from ignoring court orders serves the positive public policy function of encouraging adherence to court rulings, it appears that this is one situation in which its application could be unjust. However, the appellate court should find that willful disobedience of an order, unaccompanied by a request for a stay from the trial court is appropriate. If D had a good faith basis for not complying she should have informed the trial court and requested a stay until the appeal was decided. Here she did nothing and remained silent.

4. Effect of P commencing the action one year after his discovery.

There are three main defenses to issuance of an injunction aside from hardships disproportionate to the requesting party's. These include unclean hands (in relation to the issue at bar); laches; 1st Amendment prior restraint concerns.

Here D appears to be offering the defense of laches to the injunction. It is an old maxim that equity aids the vigilant, and not those who slumber on their rights. In the main fact pattern P waited six months before filing his claim against D. Absent more facts it is hard to see how waiting another six months would hurt P. It is important to realize that this delay could affect P's claim vis-a-vis D's adverse possession claim based on the running of the statutory period. If his delay in filing the claim resulted in the period passing without his filing the action, he would lose based on the statutory period

as much as on his unexcused delay.

There are facts that, if hypothesized, do give rise to a laches defense by D. For example, if P had found out a year ago about the encroachment of D's porch on his lot, and D subsequently undertook improvements such as repairing the porch roof, redecking the porch, enclosing the porch with screens, or any other significant expenditure of time or money, at worst D would be entitled to compensation for any such improvements, at best for D she could be allowed to keep the porch by buying the small section of P's land from him for FMV. This would be particularly true were P to have known of D's improvements and stood idly by until such time as the work had been completed. This would actually be an excellent set of circumstances for D, even if the statutory period for adverse possession had not run, and indeed is the very sort of scenario calling for the judicious application of the doctrine of laches.

ANSWER B TO QUESTION 3

1. Peter is bringing an action to get an injunction to make Debbie remove the porch from his property. His ability to receive an injunction will depend on who owns the land. Debbie may have acquired it through adverse possession. If not, the court will apply the injunction requirements to determine whether Peter is entitled to an injunction or merely damages.

Adverse Possession

Adverse Possession is a way of acquiring ownership of land that is not rightfully owned by the adverse possessor. It results from the statute of limitations on trespass claims. Here, Debbie will have acquired title to the portion of the land that her porch encroaches on if she can prove all elements of adverse possession.

Open & Notorious

The use or possession of the land must be open and notorious so that the rightful owner is put on notice that a trespass is occurring. Building or using a porch that encroaches onto another land would satisfy this requirement because it is visible to the owner. The rightful owner would have notice.

Actual & Exclusive Possession

The adverse possessor must actually possess the land. Here, building a porch is actual possession and use of that land.

The adverse possessor must also exclusively possess this land by not sharing it with the public or rightful owner of the land. Debbie and her predecessors in interest probably did not share the porch with anyone except their own guests. Therefore, their use is actual and exclusive.

Continuous

The use must be continuous for the statutory period. Here, the porch was built and presumably used for 25 years. As long as the porch was in existence with the house, it was continuous use. Although Debbie herself did not continuously use it for 25 years, she can tack her interest on to the previous owners, if they also adversely possessed the land.

Statutory Period

The land must have been held adversely for 20 years (common law) - here it was held for 25 years which would satisfy the statutory period.

Adverse

On the facts we have, it is unclear whether Debbie's predecessors in interest

held the land adversely. To be adverse, it must be without the true owner's permission. Since the original developer built the porch, it is unclear whether there was permission at that time. If so, then it would have to be held for 20 years by someone without permission, and we do not have the facts to determine this. Therefore, it is unclear whether Debbie held the land by adverse possession. If she does not, then Peter can apply for an injunction to remove the encroachment.

Injunction for Removal of the Porch

Peter will be able to get an injunction for the removal of the porch if he can show that damages are inadequate, a property right is involved, the enforcement is feasible, he wins if interests are balanced and there are no defenses to the action.

Inadequacy of Damages

Peter can only receive an injunction if damages would be inadequate. He can get money to compensate for the lost value, but because land is unique, he will not be fully compensated. Therefore, damages are inadequate.

Property Right

Although courts have broadened the definition of property rights, the plaintiff must still show that the issue involves property. Here, the issue is a porch, or real property, so this element is satisfied.

Feasibility

In order to issue an injunction, it must be feasible to enforce it and not involve too much court supervision. Here, the court could hold Debbie in contempt because she and the land are within the court's jurisdiction. Therefore, it is feasible for the court to enter an injunction.

Balancing the Hardships

In an encroachment case, the courts will usually balance the hardships between the plaintiff's interests and defendant's expenses in removing the encroachment. However, the courts will be more favorable to the plaintiff and will not balance at all if the defendant intentionally encroached on the land. Here, Debbie bought the house with the porch already attached, therefore, she did not intentionally encroach on Peter's land.

By balancing the hardships the courts will consider the great expense in removing a porch and loss in value to plaintiff's property. The court may find that a porch is easily removable compared to a solid structure. However, the costs to the plaintiff probably outweigh the benefit to the defendant of getting seven feet of his land back. He bought the land aware of the porch, even though he did not know it was on his land at the time. Therefore, the court will likely refuse to give the injunction and give money damages instead.

Defenses

Because an injunction is equitable relief, the court will not award it if the plaintiff was involved in wrongdoing or inequitable behavior. Debbie can say that Peter waited too long to bring suit so that laches applies. But six months is probably not too long. It is also unlikely that unclean hands applies because there is no indication that Peter acted wrongfully in regards to the porch. Therefore, Peter will get an injunction unless the hardships are balanced in
Debbie's favor.

2. If the court does issue an injunction, and she does not comply, Peter should apply to the court for a contempt proceeding or finding. The court enforces its power to issue injunctions through its contempt power. If Debbie does not comply, she can be found in contempt of court and may be issued a fine or other penalty.

Peter should apply to the court to find Debbie in contempt, and he should be successful because she disobeyed a court order.

3. Collateral Bar Rule

The collateral bar rule prohibits the plaintiff from arguing at a contempt hearing that the injunction is invalid. Debbie took the correct route of appealing the injunction itself.

Usually, a person must comply with an injunction, and the fine will not be overturned because the act was court ordered. In this case, the appellate court ruled that the injunction was invalid, but should not reverse the $1,000 fine, because she did not comply with the original court order. If she did comply, she would have suffered harm, but it could be compensated through damages (paying to rebuild porch). If she did not agree with the order, she should have gone to court for a stay of the order and would not have been found in contempt.

4. If Peter waited a full year to bring suit, Debbie's motion to dismiss would depend on two factors - laches and the statute of limitations.

Laches

If the plaintiff knows of the encroachment or other wrongful act, but sits on his rights and does nothing, then he may not be able to bring a suit later because the doctrine of laches will apply. Here, Peter would have sat on his rights for a year. During that time Debbie believed that the porch was on her property. If Peter in any way acquiesced in this belief or prejudiced Debbie by the delay in bringing suit, then he will not succeed on the merits, and the case should be dismissed.

Statute of Limitations (SOL)

If there is a relevant statute limiting the period in which Peter could bring his claim, then his suit will be barred if not brought within that period. There are no facts to indicate what the SOL is, but for trespass it is likely longer than one year.

Spring 1982
QUESTION NO. 6

Upon retirement, Bill and Jane Mason purchased a specially designed, custom-built mobile home trailer from Dealer for $65,000. They made a down payment of $10,000 and Dealer retained a security interest for the balance of the purchase price. The Masons moved with the mobile home into a space rented from Dream Park, where they paid monthly rental.

Several months later the trailer was removed from Dream Park by agents of Finance Company. Bill protested the removal and suffered a broken leg when he refused to step down and fell from the step of the trailer as it was being pulled away. He has since been hospitalized.

Because of mental distress suffered when she learned of these events, Jane has been hospitalized and under the care of a physician.

The trailer is now in the possession of Finance Company and is being advertised for sale.

Finance had erroneously repossessed the Masons' trailer, believing it was the property of Stranger. Stranger had defaulted on a debt due Finance that was secured by a mortgage on a trailer similar to the Masons' trailer.

The fair rental value of the Masons' trailer is $1,000 a month. A small section of the trailer was dented while it was in Finance's possession. It would cost $500 to repair the dent, but the damage is neither serious nor noticeable. The Masons' clothes and other personal possessions are missing from the trailer. The Masons replaced such personal property at a cost of $5,000.

What are the rights of Bill and Jane, and what relief, both temporary and permanent, is available to them? Discuss.

Answer A to Question 6

Mason's v. Finance Company

Per the facts, agents of Finance Company - and therefore Finance Company through the doctrine of respondeat superior (the principle is responsible and must answer for the actions of his agent) - have committed a trespass to the real property of the Mason's. The tort of trespass to real property occurs whenever a person (or an instrumentality of the person) enters upon the land of another. It is immaterial whether they thought they had permission, whether no trespassing signs were posted, or whether they did not know they were on the land of another. Therefore, whether or not the agents thought they had a right to be there is immaterial. They did not.

It is also immaterial whether any damage is done by the trespasser, just the mere "bending of a blade of grass" is sufficient. The gravamen of his tort is the interference with a possessory interest in the land of another. Likewise, the property does not need to be owned by the party in possession. They do not even need to be in rightful possession - just in possession.

In the instant case, although the trailer was on rented property, the Mason's were certainly in possession. Likewise, although the agents of *FC* may not have entered the trailer, they certainly had to go on the property to affix an instrumentality to the trailer to tow it away. Thus, there was definitely a trespass to land by the Finance Company.

Secondly, *FC* has committed the tort of trespass to chattels. This is the interference with the possessory rights of a person in a chattel or item of personal property. While the trailer may be said to be, arguably, real property, since it is living space and may be attached to the land in some manner, it is also personal property. It might be thought of as a fixture, since it may be attached more or less permanently, as well. Just when a fixture becomes a part of the real property to which it is affixed is a matter to be evaluated by the circumstances. Trailers may be attached by patios, awnings, walls, etc.

However, on balance a trailer is usually thought of as personal and not real property. It is so considered by the law, in the same manner as an automobile or truck, and must be mobile - that is, on wheels. It also must be licensed as a vehicle. Therefore, it is personal property.

Since trespass to chattels is the interference with a possessory right to personal property, the issue is whether the owner was deprived of the use of the property. In the instant case, the Mason's now have been deprived of their home, a complete interference with that possessory right.

A more serious invasion in the right to property would be conversion, which the agents have appeared to have committed. FC has converted the personal property of the Mason's to its own use. This would amount to a forced sale of the property - discussed later - since there has been a total taking of the property and not just a temporary interference with possession. There is obviously no intention to return the property, since it is now up for sale. Any defense *FC* may wish to make that there was mistake and not intention on their part, should fail, since the mere intent to take,

whether or not justified, suffices. This defense of consent or right of possession through mistake would not succeed. When the agents took the trailer, Bill was injured by falling from the steps. If they placed Bill in apprehension of a harmful touching, there has been an assault in tort on Bill. It would certainly appear that this was the case, since Bill refused to leave when threatened with the removal of his home. This would no doubt put him in apprehension (not fear) that the agents were about to act in such a way as to remove something from his grasp, thereby committing a harmful touching.

The agents are also responsible for a battery to Bill when he fell from the trailer step and broke his leg. Although a batter in tort is defined as an intentional harmful or offensive touching of the person of another, the touching may be of something closely connected with the person, such as a cane or a hat. In the instant case, Bill is on a vehicle, so arguably this is not the person, and FC will want to use this in its defense

Nevertheless, the trailer is closely connected with Bill and the courts have held that a touching of a bicycle so as to cause the rider to fall was touching of the person. Therefore, since by towing the trailer away they caused Bill to fall, there should be found a touching.

FC may wish to argue that they were operating under a mistake that the trailer was theirs by right of repossession, and that therefore they had permission to commit the touching. Indeed, by insisting on his right to remain on the trailer, Bill may be

accused of consenting to the touching. On the other hand, where he is in apprehension of losing all his worldly possessions, it would be difficult to say that he did consent, and the tort of battery should lie.

Jane will have a cause of action against FC for the tort of intentional infliction of emotional distress. To succeed with this action Jane will have to prove that FC's actions amounted to extreme and outrageous behavior which went far beyond the bounds of normal decency. Such seems to be the case here, for FC's agents, in repossessing the trailer in error, have taken all of Jane's lifetime possessions, injured her elderly husband, and caused irreparable harm. FC will wish to argue that the mere repossession was not outrageous behavior since they do it all the time. By financing their home, they may have assumed the risk of repossession should they default on their loan.

This argument should fail, however, since the retaking of a mobile home, unlike a car, means taking all ones worldly possessions. It is certainly an outrageous act when one considers that Bill clung to it up till the last minute. Certainly the requirement for a physical manifestation of the emotional harm is met for this tort, since Jane has been hospitalized.

FC may also be charged with negligent infliction of emotional distress. This tort may be more difficult to prove, however, since Jane did not suffer impact to her person, the requirement in the past. This has been relinquished as an absolute requirement for the tort to lie, however, so there may be a cause of action, even though Jane was not present when the trailer was carted away.

Remedies of the Mason's

Traditionally, it was only possible to seek a remedy in a court of equity when legal damages were insufficient to recompense the plaintiff for his losses. Modernly, this restriction has been somewhat removed since the courts of law and equity have been merged. One may now plead both equitable and legal damages in the same cause of action, with the only restriction that, should there be a legal issue requiring a jury trial, that will be tried first. The clean-up doctrine, whereby equity would handle all legal as well as equitable issues is therefore no longer of import.

Equity is traditionally a court of conscience in which the remedies may be fashioned to suit the particular circumstances of the case. The legal damages to the Mason's would certainly be inadequate in this instance.

First of all, the trailer is a unique piece of property - Equity deals traditionally with property rights. According to the facts, this retired couple had it especially custom-made to their specifications. Therefore they will no doubt wish to have it returned or replevied, by the court. Property which is real is always unique, however, this also would be considered unusual and irreplaceable. Also, this is a continuing wrong, and might result in a multiplicity of suits, so that Equity would be a better remedy than law.

Certainly, the personal property inside the trailer would be irreplaceable. It was no doubt the collection of a lifetime for this elderly couple, for which the replacement cost could in no way compensate them for the loss. No doubt momentos, etc. were included.

Finally, this elderly couple have been been severely damaged by the uncouth and rough manner in which the trailer was ripped out from under them by the uncaring agents of FC.

The first remedy in equity the Mason's will wish to pursue is a temporary restraining order. They need to obtain a TRO immediately to prevent FC from selling the trailer before they can get it replevied. The TRO may be an ex parte (with the other party being present) emergency order issued by the court prior to having a permanent injunction issue. The TRO is good for the brief time period - up to 10 days - prior to the hearing for the injunction. Should it be granted, as it would appear that it will, then, when the trial begins, the court may issue a temporary injunction to be in place during the trial.

If the TRO is ex parte, the complainant will have to issue a surity to cover any damages should it be found by the court to have been ordered in error.

If the property were such that a sale was involved, the Mason's might request specific performance - that they be permitted to continue with the sale and obtain the unique item. However, since this is their property the replevin of the trailer should suffice.

FC will wish to defend this equity action, however they will not have sufficient cause to defend on the clean hands doctrine. Should the plaintiff in an equity action be found to have been equally culpable in some action connected with the equity cause, and to have injured the defendant thereby, the plaintiff will not be permitted to recover. Here, however, the Mason's are totally innocent in the action. So the defense of unclean hands will not succeed.

Likewise, the equitable defense of laches - losely equivilant to the statute of limitations - will not lie. The Mason's have not sat upon their rights in this instance and would be diligently pursuing their cause of action in a timely fashion. This defense will fail, also.

Along with the equitable remedies of the Mason's, they will be entitled to their legal damages for the injuries suffered. They would certainly be entitled to nominal damages - a small amount in token of damages where no real or actual damages have occurred.

Certainly they will be entitled to their actual damages in compensation for their injuries. Compensatory damages would be available for the damage to the trailer of $500 to repair. Where property is damaged, the value to repair or the value of the property prior to the accident is the measure of the award, whichever is greater.

Here, should it be found that there was an actual conversion, the Mason's should be awarded the fair market value of the trailer - a forced sale - at the time of the taking. However, since this is a unique vehicle, and since it may have depreciated since it was bought, the FMV may not be a sufficient amount. The Mason's will wish to have it returned and to sue for the value of the interruption to their possessory use.

Therefore, the rental value of the trailer would be another damage. The rental value of the lot would also be an out-of-pocket cost to the Mason's plus the cost of living somewhere else while they have been deprived of their home.

The cost of the furnishings and personal possessions inside the trailer would be likewise recoverable. The actual replacement cost, rather than the FMV would be more suitable since the FMV of old clothes is nil. They will also sue for their personal injuries and the pain and suffering caused by the agents.

Finally, there is the issue of punitive damages. These will be available if the court finds FC's behavior to be so reprehensible as to deserve punishment more than just the payment of money damages. The amount of punitive damages awarded, while it may be loosely related to the injury caused, will be more likely to be whatever the court finds the defendant should be paying for their errors.

Since the idea is to punish rather than recompense the plaintiff for the wrong, damages which are punitive will be based on the ability of the defendant to pay plus the magnitude of their wrong. They serve as a warning to others not to repeat the wrong.

Answer *B* to Question 6

The rented space at Dream Park

Bill and Jane, because they rented the space at Dream Park, had a possessory interest in that real property. Finance is liable to them on a theory of trespass when its agents entered into the rental space to repossess the trailer. The repossession was an intentional act that interfered with Bill and Jane's possessory interest. A mistake of fact will not otherwise excuse a trespass, so their mistaken belief that the trailer was one that they had a right to recover is not privileged.

Because of the trespass, Finance is liable for at least nominal damages and for any actual injury to the rental space that was caused when the trailer was removed. In addition, these damages may serve as a predicate for punitive damages. Punitive damages will most likely not be awarded if Finance was acting in a good faith belief that the trailer was one to which they had a valid claim of repossession. Nevertheless, after Bill protested and the Finance company continued, a jury might find that the subsequent action was not based upon any good faith belief and that the repossession was effectuated with an intent to cause injury to *Bill* and Jane's possessory interest in their trailer. Such a finding of malice would support punitive damages. In addition, it would probably support punitive damages predicated upon any other actual injury that Bill and Jane suffer. These are discussed below.

The repossession of the trailer

Bill and Jane's rights in the trailer should be analyzed as rights in a chattel and not

as rights in real property. The trailer was not a fixture attached permanently to the rental space. This is the obvious intent of mobile home trailer parks, and the conclusion is also supported by the fact that the removal of a trailer will not do any substantial damage to or lower the value of the rental space. As a consequence, the trailer did not become part of the real property on which it was situated.

The owner of a chattel may bring an action for larceny or conversion where a third party deprives them of possession with an intent to do so permanently. The fact that the trailer is now for sale by Finance indicates that they have the requisite intent to deprive Jane and Bill of possession permanently.

The cause of action for conversion also extends to the items in the trailer that are no longer there, i.e., the clothes and other permanent property. Although the facts do not disclose how these items were disposed of, it can be assumed that they were either sold or destroyed. If sold, there is the requisite intent to deprive the owners of possession permanently for the cause of action for conversion.

With respect to the trailer and those items that can be located, Bill and Jane may recover damages. In effect, the action is a forced sale that requires Finance to purchase the trailer at its fair market value determined either at the time the trailer was taken or at the time that Bill and Jane made a demand for its return. The fact that Bill and Jane paid $10,000 down is of no significance in calculating their damages. They are still liable Dealer for the full purchase price -- $65,000. In addition, Bill and Jane should be able to recover for loss of use -- $1000 per month in rental.

Moreover, Bill and Jane might use replevin to get the trailer back. Although a restitutionary remedy, this is a legal one and can be instituted at the beginning of the lawsuit. As a consequence, Bill and Jane will be able to regain possession of the trailer immediately without waiting for the outcome of the lawsuit and before any further actions are taken against their interests, e.g., the proposed sale by Finance.

Since the trailer that was purchased was custom built, damages may be inadequate. The facts do not disclose the extent to which the trailer was unique. On the one hand, it was custom built and the ability of Jane and Bill to replace it might depend upon whether that particular custom trailer builder is still in operation. On the other hand, Finance took the trailer because it was like another, suggesting that there are other places to purchase such trailers. To the extent that the trailer is unique, monetary damages will not be adequate and Bill and Jane will be able to seek the equitable remedy of a constructive trust. Such a remedy is imposed to prevent an unjust enrichment by the wrongdoer. In this case, Finance will be unjustly enriched by selling a trailer that they did not finance. The court's order imposing constructive trust will require the Finance Company to convey the trailer to Jane and Bill.

The same equitable result could be obtained by seeking a mandatory injunction, requiring the Finance company to convey the trailer to Bill and Jane. Such an injunction would be feasible as it would not involve the court in any overreaching supervision of the parties. The court can simply order Finance to restore the trailer to the rental space in Dream Park. Moreover, Finance does not appear to have any defense to an equitable remedy such as, for example, a claim of laches or that Bill and Jane have "unclean hands."

Damage to the trailer and the lost possessions

The owner of a chattel may bring an action for trespass to chattel where a third party interferes with the chattel in such a way as to damage or destroy it. The dent in the trailer, although not serious or noticeable, will cost $500 to repair. Because of the substantial cost of repair, such damage would appear to be serious enough to give rise to the cause of action. In addition, for those personal possessions that are presumed to be destroyed, Bill and Jane will be able to recover under this theory as well. This will

probably extent to their out of pocket expenses of $5,000 to replace the personal property.

The proposed sale of the trailer by Finance

As discussed above, the trailer may be unique because it was custom built. As a consequence, monetary damages may not be sufficient. Moreover, the proposed sale presents a serious risk of irreparable injury to Bill and Jane. If the trailer is sold to a bona fide purchaser without notice of their adverse claim to the trailer, Bill and Jane will be cut off from all of their equitable remedies. This would place them into a "Catch-22" because they will be forced to go after monetary damages that are most likely inadequate.

Because the proposed sale presents a serious risk of irreparable injury, Bill and Jane should seek a T.R.O. enjoining the sale. The T.R.O. -- temporary restraining order -- is typically obtained in an ex parte proceeding in which the plaintiffs show that they are likely to prevail upon the merits. The facts in the instant case clearly seem to be on the side of Bill and Jane because Finance Company repossessed the wrong trailer. A T.R.O. usually lasts for five or ten days, after which the defendant must show cause why a preliminary injunction should not issue. This proceeding is adversary and requires that the defendant show that the plaintiff is not likely to prevail -on the merits. Again, because Finance took the wrong trailer, it does not appear as though they will prevail. At the trial on the merits, the issue will be whether an injunction should issue, enjoining Finance permanently from disposing of Bill and Jane' trailer at a foreclosure sale. Such an order would probably not be necessary as Bill and Jane will have prevailed on their other claims and will have recovered the trailer.

Bill's broken leg

Bill has an action against Finance to recover damages for his broken leg on a theory of battery. The fact that Finance company's agents did not directly touch Bill will not prevent Bill from prevailing on the merits. A battery can be committed by an indirect touching such as, for example, where the plaintiff falls into a pit that set as a trap. The instant case is indistinguishable. By moving the trailer while Bill was on the step, Finance caused Bill to touch the ground where he sustained his injuries. Moreover, the expenses of hospitalization along with pain and suffering were caused by that touching and can be recovered by Bill.

Bill could probably recover for the same damages on a theory of negligence. The Finance Company owes a duty of care when repossessing. Under the Andrews view, this duty is owed to everyone in the world. Under the Cardozo view, however, it is owed only to those who are in the zone of foreseeable risk. This zone could be defined in many ways, all of which include Bill. On the one hand, the zone most assuredly extends to those people who resist repossession. Here, Finance owes a duty of care to insure that repossession does not inflict physical harm. They should have, for example, called a police officer to superintend the situation to insure that no one would be injured. It is not persuasive that the zone of danger extends only to those people against whom the Finance company has a legitimate claim. It is foreseeable, as in this case, that a repossession might be attempted against the wrong party. Hence, people who might be mistaken as the owners of property that is to be repossessed are in the zone of foreseeable danger, especially if they assert their lawful rights to resist the wrongful repossession.

Under either view, Finance had a duty of care that it owed to Bill that was breached when it moved the trailer while he was still standing on the steps. The broken leg, the pain and suffering, and the consequent hospital costs were foreseeable results of that breach. Finance is therefore liable to Bill for his broken leg on this theory as well.

Jane's emotional anguish

Jane will probably not be able to recover for her emotional anguish on a theory of intentional infliction of emotional distress. For this, she needs to show that words or actions were directed to her with the intention of causing the distress. Since she was not at the trailer when it was removed, her suffering is probably too remote.

Nor will Jane be likely to succeed upon a theory of negligent infliction of emotional distress. For this, she would have to predicate damages upon an actual physical injury which she did not suffer.

Fall 1982
QUESTION NO. 2

Jill, a married public school teacher in her late twenties, became involved several years ago in an affair with Don, her principal at Hudson High School. Jill broke off the relationship after counselling with her minister. Since that time Don has attempted to continue the affair. He called Jill at her home, threatened to make a full disclosure to Jill's husband, and, without cause, charged her with violations of school regulations.

Because of Don's harassment, Jill resigned her position at Hudson effective at the end of the school year and applied for a new teaching position for the next school year at Clark High School in an adjoining school district. She was notified by Clark officials that her application had been accepted and that she would be employed for the next school year. A few days later, however, she received notice from Clark that upon reconsideration her application had been "finally rejected."

Jill was advised by a Clark official that, in response to Clark's inquiry, Don had reported that Jill was a woman of poor moral character who often appeared at work with alcohol on her breath. The Clark official stated that her application had been rejected based on the information supplied by Don. In fact, Jill has never appeared at work with alcohol on her breath.

Jill commenced an action against Don seeking damages and equitable relief. Jill alleged that unless Don is restrained she will be unable to find employment with other schools because schools routinely make inquiry of former school employers; that she is unable to find other employment except as a waitress at two-thirds the compensation she could earn as a teacher; that she has declined such other employment; and that because of fear and emotional trauma she has suffered and is continuing to suffer irreparable injury.

To what relief, if any, is Jill entitled against Don? Discuss.

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ANSWER A TO QUESTION 2

The first cause of action Jill can proceed under is intentional infliction of emotional harm. Under this theory D's conduct must be intentional, outrageous and extreme resulting in severe mental suffering and distress and damage. In this case it appears Don has the requisite intent. After Jill broke off the relationship, he attempted to continue the affair. He called her at home, threatened to disclose the affair and without cause charged her with violations of school regulations. Therefore Don would have intent. Is his conduct outrageous and extreme? Here, he has made threats, charged her with violations of school regulations. This conduct is extreme and outrageous to the reasonable person. Therefore I would conclude this element is satisfied. Has Jill suffered severe mental suffering? Here the facts state that she has suffered severe and emotional trauma and is continuing to suffer. Therefore it appears she has suffered severe mental suffering.

Some jurisdictions require the plaintiff to exhibit physical manifestations in order to recover, and in the absence of such requirement, Jill would be entitled to damages.

A second cause of action Jill could bring against Don would be for invasion of privacy. Under the intrusion theory, Don has invaded Jill's right to be left alone and has intruded into her private life by calling her at home, threatening to make full disclosure to Jill's husband and charging her with violations of school regulations. Therefore Don would be liable under an invasion of privacy cause of action.

The next cause of action Jill can assert against Don is for defamation. Defamation occurs when there is a defamatory statement made of and concerning plaintiff, there is falsity, with publication and resulting damages.

We must determine whether Don made a defamatory statement. Usually a statement will be considered defamatory if it injures plaintiff's reputation in the eyes of decent citizens. Here Don has reported that Jill was a woman of poor moral character who appeared at work with alcohol on her breath. These statements would injure Jill's reputation in the eyes of the community especially where parents of school-aged children are concerned about the character and background of their children's teacher. Therefore there is a defamatory statement.

The statement is of and concerning Jill. Is there sufficient publication? Publication occurs when a third party is told of the statement. Here the facts indicate that Don told the Clark High School official. Therefore there is sufficient publication.

What are Jill's damages? Damages generally depend upon whether the statement is libel, written defamation, or slander, spoken defamation. Here the facts indicate that Don reported the information to the Clark official. It is not clear whether it was written or spoken. Under a slander theory, Jill's damages would be presumed if she can prove slander per se. Slander per se would occur if the statement imputes unchastity, immoral crime or relates to plaintiff's employment. Here Don has said Jill is of poor moral character and drinks. The poor moral character relates to her employment as a teacher and although drinking is not a crime, some find it immoral. Therefore Jill's damages would be presumed under slander per se.

If the statement was written to the Clark official, it would appear to be libel on its face and again damages would be presumed.

The next cause of action Jill could bring against Don would be for intentional interference with a contractual relationship. The conduct must be intentional. Here there is desire, knowledge or at least substantial certainty that Don's conduct of threatening her and charging her with violations would bring about the result. Therefore Don has the requisite intent. Is there interference with a contractual relationship? Jill did have an employment contract with Hudson and his conduct could have interfered with the contract. Moreover, Clark officials had accepted her application and notified her that she would be employed for the next school year. It is uncertain whether Jill actually had an employment contract with Clark but if she did, Don would be liable for interference. If Jill did not, she might be able to proceed under a theory of interference with a prospective advantage which would protect non-contractual relationships.

I neglected to mention that Don might have a defense or privilege to the defamation action under the theory that the school had a right to know of a person's character and background before that person is hired, and therefore the statement would be privileged under this basis. Jill would argue that although the school has a right to receive information about her character and background, the information must not be false.

Jill's damages would consist of the difference between what she was receiving as a teacher and the compensation she would receive as a waitress. There is a question as to whether Jill has to mitigate her damages in light of the fact she has declined to accept other employment. She is not required to accept the waitress job but if she were to be offered teacher-related employment, she would have to mitigate her damages and accept.

RIGHT TO EQUITABLE RELIEF

Generally to invoke the jurisdiction of an equity court, damages at law must be inadequate. Inadequacy is shown when there is a possibility of multiplicity of suits, damages are difficult to measure, there will be irreparable injury and it would be unfair for plaintiff to take damages as her relief.

Here there is possibility of multiplicity of lawsuits. Don may continue to harass her and defame her. There is some question, however, as to whether her damages are difficult to measure. Generally with intentional infliction of emotional harm and defamation, damages are difficult to measure. Moreover, the facts indicate that Jill continues to suffer irreparable injury. Because of Don's outrageous conduct it would be unfair for Jill to have to take damages. Therefore equity court would have jurisdiction.

Can Jill obtain an injunction against Don from harassing her? We must determine whether Jill has the kind of interest equity will generally protect. Here Jill has a property interest in continued employment. Therefore there would be such an interest equity will protect.

However, will equity enjoin free speech/defamation? The general rule is that equity will not enjoin free speech or defamation on the rationale that the defendant loses his right to a jury trial on the defamation issue and equity does not want to infringe on another's First Amendment right. However, there is an exception to this rule where the statement is considered to be trade libel. Jill will argue that although the defamation is personal, it also relates to her trade and employment as a teacher. Therefore under this theory an injunction would issue.

Will equity enjoin Don's harassment? Generally equity will protect constitutional rights which would include Jill's right to privacy. However, there may be some problems for the court to supervise such an order. How will the court be able to supervise Don's conduct? An equity court generally has broad discretion to fashion a remedy which is tailored to suit the needs of both parties. Here the court can limit Don's contact with Jill, keeping in mind that it must not unduly interfere with Don's freedom to do what he wants.

ANSWER B TO QUESTION 2

Jill should be entitled to recover from Don for the actual damages she has suffered and should be entitled to an injunction to prevent any future harm from him.

I. DAMAGES

Jill will be entitled to a tort measure of damages for the harm caused by Don. This will include general damages, which are presumed to be all damages which generally flow from the type of tort established, and special damages, such as medical expenses and loss of wages, which must be specially pleaded and proven. In addition, Jill should recover punitive damages if Don's conduct was sufficiently willful and reckless or malicious, to deter future conduct on the part of Don. Jill can plead the following tort theories.

I. SLANDER OR LIBEL - DEFAMATION

If Don's statement to Clark about her was in writing, it would be libel, since it is untrue and has damaged her reputation. For libel, damages are presumed, and need not be specially proven.

Assuming the statement was oral, it is slander, and damages must be specially

proven unless it is slander per se (impugns one's business dealings, alleges a loathsome disease, alleges moral turpitude, or impugns unchastity to a woman). Jill's chastity has been impugned, since Don called her an immoral woman, but Jill is married and it is arguable whether unchastity is impugnable to a married woman. Also, "poor moral character" is rather general, and does not specifically allege unchastity or moral turpitude.

If the statement is not slander per se, Jill must prove that she was harmed by it, due to the impermanence and lesser exposure of slander, as compared to libel. She must show the elements of slander -- publication of a false statement to a third party which harms her reputation. Don published by reporting to Clark and at least part of the statement (that she came to work with alcohol on her breath) was untrue. She need not resort to inducement, since the statement clearly referred to her and is defamatory on its face.

The special damages Jill can prove are her loss of employment with Clark and her fear, trauma and suffering. The loss of employment with Clark was prospective in nature, but **since** there was a commitment made to her, and this was withdrawn because of Don's defamation, causation is established as to what she would have earned from Clark.

Her duty to mitigate damages by seeking other employment only extends to employment in a similar field and area and of a similar salary and type. A job as a waitress at 2/3 of her salary is not of such similarity, and she was under no obligation to accept it. Therefore, Don cannot use this to offset his damage liability to Jill.

Don might defend the defamation action by claiming that it was a true statement, but he would have the burden of proving truth. Since at least half was untrue, he will not be able to overcome this burden. The other half, that she had poor moral character, is arguably true, if a married woman's having an affair is immoral.

Don might also defend that he was privileged in making a character reference of his former employee. This is a limited privilege, however, and can be lost by excessive publication or excessive scope statements beyond the context of a simple reference). Don's statements seem to be well beyond the normal comments on an employee's working ability and such excess will destroy his privilege.

2. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Don's conduct was outrageous, well beyond what a reasonable person should have to tolerate in today's society. It was done with the intent to harm Jill -- such intent can be implied from the fact that his actions were substantially certain to produce the harm she suffered.

Don has no apparent defenses to this tort, since Jill did not consent. And Jill suffered discernible distress -- physical impact is no longer required.

3. INTERFERENCE WITH CONTRACT/BUSINESS RELATIONS

Don has intentionally interfered with Jill's contract, or commitment to teach at Clark. He has not done it to further any proper interest of his own, but merely to damage Jil. He has no apparent defense for this tort, since he was not in competition with Clark for Jill, she having already resigned.

4. INVASION OF PRIVACY

Don has unreasonably intruded into Jill's private life by calling her at home, threatening to tell her husband and charging her with school violations falsely. This same outrageous conduct which established Intentional Infliction of Emotional Distress can also constitute intrusion into her privacy, since it involves her home. And the false charges can be putting her in a false light, if the dissemination of the charges is sufficiently widespread.

Under these tort theories, Jill should be able to recover the damages discussed aboye, both for past loss and suffering, and for reasonably foreseeable medical/loss-of-earnings damages in the future.

II. INJUNCTIVE RELIEF

Jill is not entitled to restitutionary relief, since Don has not benefited from the actions. She should, however, be entitled to an injunction to restrain Don from continuing his tortious treatment of her.

As a start, Jill should seek a temporary restraining order (Ex Parte) or a preliminary injunction, to prevent any harm while the permanent injunction is being litigated. The TRO or PI will be granted if Jill can show irreparable harm if it's not granted and the likelihood of success on the merits once litigated. Jill can show the irreparable harm because Don is a respected principal whose comments have been and can continue to prevent her from working in her field. Her chances of success on the merits are very good, and no great harm will be done to Don if he is temporarily enjoined from his actions.

PERMANENT INJUNCTION AGAINST DON

Jill's basis for a permanent injunction will be that there is: 1)

INADEQUATE REMEDY AT LAW

Damages are inadequate because the actions could continue, causing new damages, necessitating a new lawsuit, resulting in multiplicity of suits. There is no appropriate

restitution available.

2) PROTECTABLE INTEREST

While traditionally equity would only act to protect a property interest that rule has been expanded in all jurisdictions to protect personal interests (such as privacy and reputation) as well.

3) FEASIBILITY OF ENFORCEMENT

The court can issue a negative injunction, forbidding Don from calling Jill, having any contact with her or her family, or discussing her with prospective employers. This can be easily enforced through a contempt proceeding, should Don disobey. The difficulty is in drafting the injunction, so that its prohibitions are sufficiently explicit, unambiguous and specific to be enforced by contempt.

Since Don's actions are willful, there is no balancing of interests to be applied, as might be necessary to enjoin a nuisance or encroachment.

4) DON'S DEFENSES

Don can defend the injunction on the grounds of privilege of employer to give references (discussed above under Defamation).

He can also defend on the basis that Jill has unclean hands, since she was a willing participant in the affair. This defense will fail, however, because the unclean hands must occur in the same transaction now being complained of. The affair was several years ago, and the transactions being complained of now are Don's spiteful actions, to which Jill has not been a willing contributor.

Don can also defend that an injunction would unconstitutionally inhibit his freedom of speech and association, constituting prior restraint. This defense will fail also. Defamation is not protected speech under the First Amendment and can be enjoined or restrained. The cases involving prior restraints and defamation involve the media reporting on public figures, holding that the reports are not enjoinable or actionable absent malice (N.Y. Times v. Sullivan) -- the knowing falsity or reckless disregard for the truth. Such cases are not applicable to private figures (Gertz) and only show showing of fault (negligence) is required for the media defendant.

A fortiori, Ann should not have to show more, since she is a private figure and Don's defamation does not involve use of print or other media. The constitutional cases will not help Don, since his speech is not protected by any of the traditional privileges.

Although we don't know how long Jill has waited to seek advice, there is no

showing of laches on these facts.

Therefore, it would seem that an injunction is the best way to protect Jill from Don's intrusions into her life and damages to her reputation and career. It would give no hardship to Don to stop bothering Jill and can be readily enforced without excessive court supervision. Therefore, an injunction should be granted in addition to the damages discussed earlier.

July 1983

QUESTION 1

In 1980, at the wedding of Tom and Mary, Tom's father, Frank, told them that he wanted them to live with and care for him for the rest of his life. He said, "If you agree to do this, I will deliver to you, within a year, a deed to my home." Tom and Mary told Frank they accepted his offer and promised to look after Frank with loving care in Frank's home. They immediately moved in with him .

Soon after moving into Frank's home, using their own money, Tom and Mary added a new wing to the house, paid the outstanding property taxes, and paid off an existing mortgage of $25,000.

One year after Tom and Mary moved into the home, Tom reminded Frank of his promise to convey the property to them. Frank became angry, refused to execute the deed, and ordered Tom and Mary to leave the premises.

Tom and Mary consult you concerning their rights and the remedies that may be available to them.

How would you advise them? Discuss.

ANSWER A TO QUESTION 1

I. Was there a valid contract?

This question involves contracts and the initial determination is whether there was a valid contract.

A. Offer

Frank's statement to Tom and Mary at their wedding in 1980 was an offer. A reasonable person listening to Frank would conclude that he intended to create a contract, to confer on Tom and Mary the power of acceptance. The offer was communicated to identified offerees, i.e., Frank spoke directly to Tom and Mary. Finally the offer contained definite terms -- Mary and Tom were to live with Frank and care for him until his death and Frank was to deliver the deed to his home (assuming he has only one home).

The offer is an offer for a bilateral contract. Frank said, "if you agree"; he is requesting a promise, not an act.

B. Acceptance

When Tom and Mary said they accepted Frank's offer, their acceptance was effective. Their language objectively manifested intent to accept. They communicated their acceptance to the offeror, Frank. Their acceptance mirrored the terms of the offer.

C . Consideration

This was an executory bilateral contract with Frank's promise acting as consideration for Tom and Mary's promise and vice versa. However, there may be a problem with the Statute of Frauds.

D. Statute of Frauds

The contract was oral. Oral contracts are valid unless they fall within the subject matter covered by the Statute of Frauds, in which case the contract must be written to be valid. This contract involves land, and under the Statute of Frauds, contracts involving land must be in writing. (Note: This contract does not come under the aegis of contracts incapable of being performed in one year since the courts will look at any conceivable way the contract could be performed within one year. Here Frank could die within one year and he promised to deliver the deed "within one year".)

Thus, because the contract involved land (a deed to a home), at the time of formation this oral contract was unenforceable.

However, a contract involving land can be removed from the Statute of Frauds where the Buyer, in this case Tom and Mary, enters into possession and either makes improvements or makes payments. Such action by the Buyer substitutes for the evidentiary function of a writing.

In the case at hand, Tom and Mary entered into possession and made improvements on the house (added a new wing) and also paid off the outstanding taxes

and mortgage. This action removed the contract from the Statute of Frauds and there was a valid, enforceable contract.

II. Was there a breach?

A. Conditions

Given Frank's original offer's language, a court would probably find that there was an implied condition to Frank's performance. That condition is that Tom and Mary move in with him and begin to care for him that first year. However, Mary and Tom satisfied this condition -- they moved in with Frank and took care of him for a year (although the facts are unclear as to whether they did take care of Frank) . Thus, the passage of the year and the actions of Tom and Mary satisfied the condition precedent to Frank's duty and his duty matured.

B. Breach

When Frank refused to execute the deed and ordered Tom and Mary to leave, he breached the contract since his duty to deliver the deed had matured.

III. What are Tom and Mary's remedies?

A. Damages

The usual measure of damages in a breach of contract case are expectation damages; the non-breaching party is entitled to the benefit of the bargain. However, in this case damages are difficult, if not impossible, to ascertain. Mary and Tom could argue that what they got was nothing and what they should have gotten was the home and are thus entitled to the full value of the home.

However, the problem remains that they were still under a duty to take care of Frank for his life. Mary and Tom would argue that Frank's kicking them out constituted a waiver of their future duties and that he should be estopped from offsetting from the damage award the value of their future services. The better remedy appears to be restitution or specific performance.

B . Restitution

Tom and Mary could sue Frank under a quasi-contract theory for unjust enrichment. Under this theory, they could recover the benefits conferred on Frank. Specifically, they could recover i) the cost of the improvement to the house, plus ii) the amount spent to pay off the taxes, plus iii) the $25,000 to pay off the existing mortgage, plus iv) the reasonable value of their services in caring for Frank for the year.

C. Specific Performance

Tom and Mary could sue Frank for specific performance, asking the court to order Frank to transfer the deed. They would have to show:

1. Inadequacy of the legal remedy. A court will act in equity generally only where the legal remedy is inadequate. Tom and Mary can show that the legal remedy is inadequate. First, damages are difficult to ascertain; the damages are speculative. Second, and more importantly, the contract involves land and courts consider land unique.

2. Definite and certain terms. Courts will not order specific performance unless the contract is clear and unambiguous. In this case, Frank's duty is clear -- deliver the deed. A court would consider such a duty definite.

3. Feasible. This is the stumbling block for Tom and Mary. A court will order specific performance only if the decree is feasible. Here, some of Tom and Mary's duties are executory. While courts do grant conditional decrees of specific performance, conditioning the defendant's performance on satisfactory performance by the plaintiff, such a decree is unfeasible here since Tom's and Mary's duties are in the nature of personal services. A court will not order specific performance of personal services and thus it would probably not grant a conditional decree.

4. Mutuality. Although mutuality of remedy is not as big a requirement today as in the past, given the problems of enforcing Tom and Mary's personal services (see above) , a court may well hold that since Frank could not get specific performance, neither can Mary and Tom.

5. Defenses. There may be a laches problem. It is now 1983, two years after Frank's breach. That is an issue of fact. Unclean hands does not apply, nor do any other defenses appear from the fact.

Given the problems of feasibility and mutuality, specific performance is probably not available.

IV. Unenforceable contract.

Even if the court holds that the contract is unenforceable, Tom and Mary can still. recover in quasi contract. (See III, B, supra.)

ANSWER B TO QUESTION 1

(1) Tom and Mary's Rights In Contract

(A) Contract Formation (i) Offer

and Acceptance

Frank ("F") said to Tom and Mary ("T & M") that he would commit himself to conveying a deed to his home in exchange for their promise to care for him for the rest of his life. These words constitute an "offer" because they communicate a willingness to be bound. By requesting a return promise, F contemplated a "bilateral" contract. T & M gave their return promise and thus the offer and acceptance took place.

(ii) Consideration

An exchange of promises which involves a "legal detriment" to each promisee constitutes consideration -- the inducement to contract which allows a court to enforce a contract. In this case, since T & M had no "prior duty" to care for F by living with him, and F had no prior duty to convey, there is legal detriment on both sides and the contract is binding if there are no defenses.

(B) Statute of Frauds (i) Applicability

The Statute of Frauds requires that all contracts to convey real property be in writing to be enforceable. In this case, F "told" T & M he would convey his home. His home is real property covered by the Statute, and the agreement apparently was oral. The contract is thus prima facie required to be in writing.

(ii) Part Performance Exception to Statute of Frauds

Under the part performance exception, a contract which otherwise must be in writing may be enforced if one party performs part of his/her obligation. In this case, T & M agreed to care for F for the rest of his life. T & M moved in with F after their wedding. The facts imply, without stating, that T & M cared for F. T & M lived with F for a year. Since these actions were part of their promise to F, T & M satisfy the "part performance" exception to the Statute of Frauds. Thus, their contract with F will be enforceable.

(C) Satisfaction of Conditions and Breach of Duty

T & M promised to care for F for the rest of his life. F promised to convey his home to them "within a year". Expiration of the year was thus a "condition precedent" to F's duty to perform by conveying. Caring for F was, on the other hand, a "condition subsequent" to T & M's right to receive performance. At the end of one year, T reminded F of his promise. Since the condition precedent had been "satisfiPd", F's duty became "matured" and absolute. By not conveying his home to T & M, F was in breach of his duty. A breach will be "total" when it involves a failure of the basis for the bargain. Here, the conveyance of the house was T & M's bargain. F's failure was thus a "total breach", justifying T & M receiving appropriate remedies.

(2) Remedies Available to T & M

(A) Specific Performance

(i) Inadequacy of Legal Remedy

In most contracts, such as those for the sale of goods, monetary damages -a substitutionary remedy -- is the legally preferred remedy. Thus, a plaintiff must demonstrate that his/her legal remedy is "inadequate" before equitable remedies such as specific performance are available.

In land sale contracts, however, specific performance is the preferred remedy. The policy reason is that land is "unique" and thus money damages are inherently inadequate. T & M will receive specific performance if they can demonstrate that the other prerequisites to that remedy are met: the contract must be "definite"; a decree "feasible" to enforce; there must be "mutuality" of performance; and, no good "defenses".

(ii) Definiteness

A contract's terms must be sufficiently clear that a court knows what to order a defendant to do. Since F promised to convey his home, a court could issue a clear order, and this prerequisite to specific performance is satisfied.

(iii) Feasibility

A court will order specific performance only if its decree is feasible to enforce. In this case, the court could order F to convey his home and enforce that order by contempt of court. Specific performance is thus "feasible".

(iv) Mutuality

At common law, there had to be "mutuality of remedy" for a contract to be specifically enforceable. That is, a defendant could be ordered to perform only if he/she could have obtained specific performance if the other party had breached.

The Restatement and modern courts supplant this test with the "security of performance" test. That is, a court will order specific performance as long as the other party is subject to remedies for breach, even if that remedy is not specific performance.

T & M cannot be ordered to care for F if they do not wish to, because courts do not specifically enforce personal service contracts. Thus, the older mutuality of remedy test would not have been satisfied.

The newer test is more difficult to apply in this case. If T & M breached, a court could order money damages to F. F's bargain, however, was for T & M's care. Money damages would not adequately substitute for that performance. Thus, under even the modern test there would be a failure of "mutuality" and T & M therefore could not receive specific performance.

(B) Damages

Money damages -- a substitutionary remedy -- are available for land sale contracts where specific performance is not available. The measure for such damages -- which protect the parties "expectation interest" -- is the difference

between the contract price and the value of the performance tendered. Such damages will be available if the amount is certain, the loss foreseeable, the damages causal, and the loss unavoidable.

In this case, the difficult requirement is valuing T & M's services. Since it is very difficult to value personal care services, a court probably would decide that the "certainty" requirement was not met and damages thus are not available.

(C) Restitution

When damages measuring the plaintiff's loss are unavailable, restitution to disgorge defendant's "benefit" will be available if such benefit would be "unjustly retained".

As described supra, T & M have partly performed their promises. They have added a new wing, paid taxes and a mortgage. Their performance was in consideration of F's promise. F's retention of these benefits would be "unjust" because they were bargained for and T & M r(-lied apparently on F's promise when they invested money in the house. Restitution of the amounts spent is thus appropriate.

(3) Conclusion

Since neither specific performance nor monetary damages will be available, the court will order restitution by F of the benefits received from T & M.

February 1985

QUESTION 4

Al planned to build a large shopping center in a suburban area. Betty agreed in writing to sell Al her 100 acre farm located in the center of the proposed development. Al deposited with Betty a portion of the purchase price, the ba-lance to be paid upon delivery of the deed by Betty. At the time their written contract was entered into, Al told Betty only that he was buying her land and 200 acres from other local farmers for a "big project."

Relying upon Betty's agreement, Al purchased the surrounding 200 acres from other farmers. He paid them the same price he had contracted to pay Betty--$1 ,000 an acre. This price was $200 an acre over market value.

Claude, hoping to build his own shopping center on other nearby land, paid Betty $100,000 to refuse to convey her property to Al. Betty falsely notified Al that she could not complete the sale because she had discovered a defect in her title. Al reluctantly accepted return of his deposit. Without Betty's land, Al could not develop the shopping center as planned, and he has offered his 200 acres for sale.

Claude purchased the land for his shopping center from local farmers for $500 an acre, $300 below the former market value, because land values in the entire area plummeted once Al offered his 200 acres for sale. Claude's shopping center is nearing completion.

Al has recently learned of Claude's arrangements with Betty. What

legal and equitable remedies does Al have: 1 Against Betty?

Discuss.

2 Against Claude? Discuss.

ANSWER A TO QUESTION 4

1. Remedies against Betty

Betty's statement to Al was a material misrepresentation on which Al relied. This is both a tort and a breach of contract on Betty's part.

Generally, when a contract concerns a land sale, the contract is specifically enforceable because land is unique and, therefore, per se, the legal remedy is considered inadequate. Before specific performance of a land sale will be enforced, four factors must be met:

1) The buyer must be ready and able to perform--here we are not told Al is not ready to perform so this is met.

2) The seller must have marketable title to convey--Betty did have marketable title.

3) Time is of the essence (reasonable time if not stated)--here this is no problem.

4) Abatement of purchase price if factors warrant (this is inapplicable here).

Since all of these factors are met, the court will specifically enforce a land sale contract if the general test for specific enforcement of contracts is met. That test is:

1) Inadequacy of legal remedy--as noted land is considered unique and legal remedy per se inadequate.

2) Definite and certain terms--no problem here since land is described and price described--all material terms so court can enforce.

3) Feasible to enforce--no problem for court to enforce in theory although note that Claude's shopping center (presumably built on Betty's land) is almost complete--court may determine equitable relief is inappropriate.

4) Mutuality--this (modernly) only requires that Al be ready and willing to perform (Court could condition relief on Al's performance).

5) Lack of defenses--Al is not guilty of laches or unclean hands in this matter. The only possible defense is hardship--however, since that usually refers to onerous terms of a contract or failure of adequate consideration, it is probably not applicable.

Generally, equitable relief is the exception and damages the norm--however, in land sale contracts the usual remedy is equitable relief.

Al could, however, try to get contract damages from Betty. In contracts and torts, damages must be actual, certain, foreseeable (causal) and unavoidable. The usual

method of awarding contract damages is to give the non-breaching party the benefit of his bargain.

Note that, generally, punitive damages are not available in the contract context except in very limited circumstances, e.g. , breach of duty of good faith when contract is between insurer and insured (or some other similar fiduciary) .

The problem with damages here is that Al was going to pay Betty $200 an acre more than market value. A buyer's usual damage remedy is the difference between the market value and the contract price. Here, that would give Al no relief.

The buyer is also entitled to get consequential damages but these must be foreseeable under the rule of Hadley v. Baxendale which means that they must either be foreseeable to a reasonable person in like circumstance at the time of contracting or they must be foreseeable based on special facts made known at the time of contracting.

Al's consequential damages (loss of profit from running shopping center, etc.) are problematic for several reasons. First, under the facts there would be no way for Betty to have foreseen these damages under either test stated above since they are not usually foreseeable from breach of land sale contract and since Al never told her that he intended to build a shopping center. Arguably, she should have anticipated some consequential damages since he did tell her that he intended to use the land for a "big project". However, the damages are still too uncertain since he would be basing them on a new business--this is too speculative to measure. Al would also, under contract law, have a duty to mitigate his damages--meaning try to buy similarly suitable land and build there a shopping center, etc. In my view, the contract measure of damages is probably not the chosen relief under these facts.

Al may be entitled to restitutionary remedies: in other words, the legal restitutionary remedy of getting the money received as a result of the bad faith breach or the equitable remedy of constructive trust or equitable lien. Here Betty received $100,000 from Claude. Arguably, any of these methods of enforcing a duty on Betty to give up her unjust enrichment would be the favored relief against Betty.

Al could also choose to treat Betty's breach as a tort and get the tort measure of damages and punitive damages since Betty's knowing misrepresentation was at least reckless if not intentional and therefore, punitive damages are available.

The tort of intentional misrepresentation requires a material mispresentation with intent to defraud on which the plaintiff relies and as a result of which the plaintiff suffers damage. All of those factors are met here since marketable title is clearly material to a land sale contract and Al was definitely injured as a result of Betty's knowing intent to deceive him. (Note that negligent misrepresentation and intentional infliction of emotional distress are probably not available under these facts since the first is usually in the commercial context and the second requires "shocking" behavior.)

Assuming Al tries to get tort damages, these must also be actual, certain, foreseeable and unavoidable. The measure is to put Al in the position he was in before the tort. The advantage to these damages is the availability of punitive damages. Unfortunately, since Al did not have much in the way of actual and certain and foreseeable damage (i.e. , he was getting land less valuable than market price and his

consequential losses were speculative at best) and most courts require some relationship between punitives and actual (percentage), this remedy would not be ideal.

Al can get restitution in tort also. This would be (legal remedy) the money received from Claude by Betty or constructive trust put on money (or equitable lien on anything she bought with it) .

Injunctive relief in tort would also be available but again the problem may be feasibility of enforcement (no real legal obstacle but would court order Claude to tear down his shopping center as a practical matter).

2. Against Claude

Claude has committed the tort of intentional interference with contract and intentional interference with prospective advantage.

Again, the tort measure of damages would be to put Al in the position he would have been in absent the tortious act. Punitives are available as well since Claude acted intentionally. Most courts don't allow a plaintiff to get more from an intentional interferor than they can get from the contract breacher, so damages against Claude may be limited.

The same remedies and requirements listed above are available and the same problems exist (i.e., are damages certain enough?)

Note that here damages are foreseeable since Claude knew that Al planned to build a shopping center and acted intentionally to thwart it.

Restitution may be a good remedy here since first, as a legal remedy, Al could get the amount of unjust enrichment received by Claude (i.e. the great deal on the acres he bought, etc.) or, as an equitable remedy, Al might get a constructive trust or equitable lien on the land obtained by Claude as a result of his tort.

Injunctive relief would be available if the following test is met:

1) Inadequacy of legal remedy (met since land sale--see above).

2) Property interest--met (land).

3) Feasible to enforce--as a practical matter this could be a problem; the court could order Claude to stop building but would it order Claude to tear down the center?

4) Balancing of interests--only applies at permanent injunction stage to nuisance and encroachment, so no balancing.

5) Any defenses? No laches or unclean hands on the part of Al, so no real defenses to prohibit injunction.

The real problem with injunctive relief is a court's willingness to order a mandatory

injunction to tear the center down and convey the property to Al, but as a legal matter, it is feasible.

ANSWER B TO QUESTION 4

1. At v. Betty

At has potential remedies against Betty both on theories of breach of contract and tort. Moreover, the possible relief may be legal or equitable in nature.

The threshold question is whether a contract was ever entered into between At

and Betty. While the facts do not detail the negotiations leading up to the agreement in writing, it appears that both an offer and acceptance took place. In addition, consideration existed on both sides. At bargained for Betty's land and agreed to tender the sum of $1 ,000 per acre for 100 acres, and Betty bargained for the sale of her land at the contract price agreed to. In addition, since the contract was in writing, the Statute of Frauds was satisfied since this is a sale of land. The fact that Betty didn't know the purpose for which At intended to use the land at the time they entered into the agreement is irrelevant for purposes of creating a valid contract. Both parties intended an agreement, on the terms agreed to, and for the subject matter in question. Thus, no mistake of fact or any other "formation" issue appears to exist. This being the case, a valid contract was entered into.

Under contract law, when two parties to a contract for the sale of land enter into an executory agreement, even though legal title has not been transferred yet, equitable title passes immediately to the buyer under the principle of equitable conversion. Thus, on the contract date At possessed equitable title to the property and should he have breached the agreement (or should the land have subsequently been damaged or destroyed before final closing) At would nevertheless have been responsible for the payment of the full contract price.

When Betty told At that she had discovered a defect in title and that she could not complete the sale, this amounted to a breach of contract by anticipatory repudiation. The fact that she falsely represented to At that she had defective title should not justify this breach. In fact, had she really had defective title, this would nevertheless have caused a breach.

At the point when Betty told the above to At, At would have been justified in immediately bringing suit under the contract, or he could have waited until closing to see if Betty ended up conveying legal title. However, At didn't wait. The question is whether Al's action of requesting and receiving his deposit back constituted some mutual or unilateral agreement to end the contract and excuse Betty from her performance obligations.

Betty might argue there was a mutual rescission of the contract. This argument is not compelling. First, one can argue that the contract was not "wholly executory" since At had tendered part performance by paying the deposit. Courts are not inclined to hold a mutual rescission took place when part performance has taken place. Moreover, since a writing is necessary to agree to sell land under the Statute of Frauds, there is a real question as to whether a mutual rescission that is oral is in violation of that requirement.

It apparently was in violation. Finally, the alleged mutual rescission was based on fraud in the execution since Betty knowingly and fraudulently stated she had defective title. Thus, an agreement to rescind never took place. As a result, this theory will not be successful.

The other possible argument is that a release was effectuated. This too is not a valid claim. A release of this sort involving land must be in writing and many courts require consideration which, arguably, didn't exist. This theory therefore will also be unsuccessful.

As a result, Al has a valid claim against Betty for breach of contract. Under this

theory, he will be entitled to damages. Some courts merely permit the nonbreaching buyer of real property to recover his out-of-pocket costs. Since the deposit was returned, the only other possible loss would likely be for the subsequent loss Al will apparently suffer on the re-sale of the other 200 acres. For damages to be awarded for this, they must have been forseeable at the time the contract was entered into. While Betty didn't know all the details, she was informed that Al was buying her land as part of a "big project." Assuming a court believes these losses were foreseeable by Betty, Al may be entitled to this recovery as well.

Other courts allow a nonbreaching buyer to recover the benefit of his bargain. Here, the question is what that benefit would have been. A court would probably restrict Al to a recovery for the difference between the value of the land at the time of the sale and the contract price. Given that Al apparently paid a premium for the land, he probably won't recover anything here as a practical matter.

Al may decide to sue under a restitutionary theory instead. Here, he would make a claim under quasi-contract for the unjust enrichment gained by Betty. Betty's enrichment turned out to be $100,000 which she received from Claude. It is possible Al can get this under this theory.

Al may also want to consider seeking equitable relief for specific performance. He certainly has a valid claim for this relief. First, Al's remedy at law is apparently inadequate. Damages will not make Al "whole." Second, the contract terms are definite and certain. The amount of money to be tendered and the land in question are easily ascertainable by the court. Third, such relief is feasible. The court will apparently have personal jurisdiction over both Al and Betty as well as the land. The court can therefore compel Betty to convey title and Al to convey the purchase price. Fourth, mutuality of obligation is present. Today, courts look to the Restatement's security of performance test and it is obvious that Al can be compelled to perform his half of the bargain. Finally, there are no feasible defenses that Betty may assert. Laches is possible although it doesn't appear Al waited too long or that Betty would be prejudiced by any delay.

As a final note, while this is a feasible remedy, from a practical standpoint, Al may not want the land now that Claude has built his shopping center, unless the community could support both of them.

The tort remedy against Betty would be based upon a fraud-misrepresentation theory. Betty misrepresented a material fact to Al, knowing the
fact was untrue. Moreover, she intended to have At rely on that fact (defective title) to cancel the agreement which was clearly to Al's detriment. At did in fact rely on the misrepresentation. The only issue is whether he did so justifiably. At certainly could have checked the title himself. Courts, however, normally don't place a burden on the plaintiff to test and investigate a representation. Thus, At may be entitled to relief if he can show some actual damages. His losses suffered by having to re-sell the other 200 acres plus his loss of his shopping center are possible. However, the only foreseeable damages are probably the loss on re-sale. Thus, that is what At will be entitled to. The big question here is the possibility of punitive damages for Betty's intentional and willful misconduct. At may want to consider this tort theory for that very reason.

2. At v. Claude

Al's main theory for relief against Claude will be in tort. His best theory appears to

be for intentional interference with contractual relations. Claude knew -about Betty's deal with At and approached Betty with a scheme to break Al's existing agreement with Betty. Claude did this with the intention of getting Betty to breach the contract. Since Betty did in fact take the $100,000 and breach the contract, At has a possible theory against Claude for this tort.

For At to obtain damages under this theory, he will have to show they were actually caused by Claude's conduct, that they are not speculative, and were unavoidable. Al's damages amounted to the loss of his bargain with Betty. He therefore should be able to recover at least the difference in the value of the land at time of contract and the contract price, plus the consequential damages that resulted (i.e., loss on re-sale of the 200 acres). In addition to this, At may be able to get punitive damages against Claude. Claude's conduct was clearly willful and intentional. A jury would not look favorably on Claude's misconduct.

Another theory that At may pursue is in restitution. Here, Al's main claim will be that Claude was unjustly enriched by his intentional misconduct. The clearest example of this is that Claude obtained his land at $300 below the fair market value because of the offer by At to re-sell his 200 acres. At may be able to get this unjust enrichment. The other possible unjust enrichment, namely, the building of Claude's shopping center now without any competition from Al's planned shopping center, will likely be viewed as much too speculative.

Finally, At may want to pursue equitable relief in the form of an injunction. The problem is that it is highly unlikely a court would ever order Claude enjoined from carrying on his present activity in building the shopping center. The causal link between Claude's misconduct and the actual building of the center is weak. It merely cost Claude some additional money to build it. Moreover, Claude's main defense to any injunction would be laches. Here, he would argue that At waited too long to pursue an action against Claude, and that delay has unduly prejudiced Claude by allowing him to nearly complete the center. This is probably going to be a successful argument.

July 1988

Question 3

Without seeking bids from other contractors, Owen entered into a written contract on March 1 with Cobb, a contractor, whereby Cobb was to remodel Owen's house for $20,000. The remodeling was such that Owen could continue to live in his home while Cobb worked on it.

Owen paid Cobb $2,000 when the contract was signed. The contract calls for payment of the $18,000 balance upon completion of the work and for completion by November 1 of the same year. The contract also provides that in the event of delay in completion, the amount due Cobb from Owen would be reduced by $500 for each month, or part thereof, of delay.

When Cobb had completed 50% of the work, he informed Owen that he would not finish

the remodeling at the contract price. He told Owen that he had underestimated labor costs by $4,000 as a result of a mathematical error made by his bookkeeper. Owen refused to agree to pay a higher amount, and Cobb refused to proceed with the remodeling.

Owen promptly obtained bids from two other contractors for completion of the work. He accepted the lower of the two bids-$15,000. Included in this bid was $1,500 to remove and replace paneling Cobb had installed in the family room. Cobb had installed a much lighter weight paneling than called for by the contract. The substitute contractor completed the remodeling, including replacement of the paneling, on December 1.

Cobb sued Owen to recover the value of work he did up to the time he stopped performance. Owen counterclaimed for damages stemming from Cobb's refusal to fulfill the contract and for $500 based on late completion of the work.

After receiving evidence of the above facts, the trial judge, sitting without a jury, ruled that:

1. Cobb had breached the contract but could recover $8,000 on his claim;

2. Cobb's recovery would be offset by $5,000, as damages owing to Owen based on Cobb's breach of the contract;

3. Owen could not recover any amount based on the liquidated damages clause in the contract. Were the rulings of the trial judge correct? Discuss.

ANSWER A TO QUESTION 3

I. <u>The Judge's First Ruling</u>

Prior to deciding whether Cobb (C) breached, we have to see if there was a contract. C could argue that his bookkeeper's mistake in math resulted in no contract because of C's unilateral mistake.

In many jurisdictions, one party's unilateral mistake is never a defense to enforcement of a contract. The modern rule is that if the mistake is collateral (e.g., a mistake in math but not a mistake in business judgment such as estimation of labor costs), and if Owen (0) knew or should have known of the mistake and if C promptly notified 0 prior to any detrimental reliance by 0 on the promise, then the contract will not be enforced.

Here, the error was collateral (see above). There is nothing in the question, however, to indicate that 0 knew about the mistake. Moreover, because there is no indication that 0 has any expertise in contracting work and because 0 did not solicit or receive any other offers for the job, there is no basis on which to argue that 0 should have known of the mistake.

Finally, C did not notify 0 promptly of the mistake, and 0 detrimentally relied. He allowed C into his house (that 0 was living in at the time) to begin construction.

There is clearly a contract.

In paragraph 2 of the question, we see that the contract calls for completion of the job by November 1, with payment to follow. This language means that C's completion of the job was a constructive condition precedent to O's duty to pay. In order for C to win on a claim that 0 is in breach rather than C, C would have to show that the construction condition of completion was satisfied, discharged or excused such that O's duty to pay had matured.

Satisfaction: A constructive condition precedent (unlike an express or implied condition) can be satisfied by substantial performance where the failure to render full performance is not willful. Here, the failure was willful, and 50% is not "substantial" completion of a construction project. Since there is no argument that the contract is divisible, even partial satisfaction of a divisible part is lacking.

Discharge: This can be by voluntary release, anticipatory repudiation, wrongful interference, prospective inability to perform, or voluntary disablement. None of these are present in these facts.

Excuse: The only conceivable excuse is impracticability due to the increased cost. This won't work either. The hardship is not enough, and it's C's fault.

Because the condition was not satisfied, discharged or excused, C is in breach.

As a breaching party (material), C can recover in quasi contract the reasonable value of his services, but not in excess of the contract price.

Absent any reason to believe the reasonable value of his services is less than the contract price, he's entitled to $8,000, as ordered by the judge. The contract was for $20,000. It was 50% completed ($10,000). O's already paid $2,000. C gets $8,000.

11. The Second Ruling

Given the $8,000 award to C, Owen has paid a total of $10,000 to Cobb, $13,500 to the second contractor to complete all but the replacement of the paneling, and $1,500 to replace the paneling. Because the contract price with C was $20,000, 0 is entitled to any reasonable damages over $20,000 to give 0 the benefit of his bargain.

0 has a duty to mitigate in selecting the second contractor. He appears to have done so. He solicited two bids and took the lower ($15,000). Moreover, C said his (C's) $20,000 bid was $4,000 too low and Owen got the whole thing done for $25,000 with a change in contractors and the replacement of the paneling. At least as to the $13,500 for other than paneling, 0 is entitled to consider it in his calculation of damages.

As to the $1,500 for the paneling, 0 can recover for that as well. Because C put in paneling of a "much lighter weight" than that called for in the contract, 0 is entitled to the cost of repair (here $1,500) unless C can show that C's breach was minor (e.g., that C substantially performed) and that cost of repair is economic waste (in which case, 0 would recover the diminution in value caused by the lighter paneling). Because the paneling was "much lighter," there's a strong argument that the breach was not minor. In any case, it does not appear that $1,500 is economic waste in the context of a $20,000 contract.

0 is thus entitled to $1,500 for paneling.

The judge was correct. 0 gets the $15,000 he paid the second contractor minus the $10,000 of the contract price he did not have to pay to C, or $5,000. We know this is correct benefit of the bargain damages because 0 has already paid a total of $17,000 ($15,000 to second contractor and $2,000 to C), and the contract price was $20,000. By giving C $8,000 and O$5,000 offset, 0 pays $3,000 more, which when added to the $17,000 already paid, equals the contract price.

III. The Third Ruling

A liquidated damages (LD) clause is enforceable if it is a reasonable estimate of the damages that will be suffered and if damages are difficult to calculate.

Here, the damages from C's failure to complete the job by November 1 seem highly speculative. We know 0 lived in the house while construction was going on, so a delay would cause some inconvenience. To put a dollar figure on this damage seems unreasonable. Thus, damages are difficult to calculate.

There is no way, on the facts, to be certain that $500 per month, or part thereof, is a reasonable forecast of damages. At least as applied to the full

month delay here, they seem reasonable (but note that their reasonableness is determined as of the day the contract was entered into).

If the damages forecast are not considered reasonable, the LD clause will be void as a penalty. The LID clause appears reasonable (unless one holds that $500 would be a penalty if applied to completion one day late). Because of the court's reluctance to enforce LID clauses, it is likely that the fact that the LD clause could be applied to a one-day delay on completion will result in its voidness as a penalty. One could argue that the "or portion of a month" language should be ignored and that the LID clause

should be enforced here where the delay was, in fact, a month. This seems the strongest position.

The judge was wrong in his third ruling. 0 should have recovered $500 pursuant to the LID clause. There is an argument, however, that the LID clause is unreasonable and 0 should get nothing.

If the LD clause is enforceable, it is foreseeable that C's refusal to complete performance would cause a delay, and the damages are, therefore, payable to 0 in the amount of $500.

ANSWER B TO QUESTION 3

1. Cobb's Recovery and Breach

The first issue is whether the judge was correct that Cobb breached. Cobb clearly refused to perform on the contract -- but did he have a valid defense?

Cobb may assert that he had the right to ask for more money -- or to rescind because of the great hardship that his mistake caused him. Mistakes, however, to be a defense must either be mutual, or if unilateral, the other side must have or should have known of it.

Here, since Owen did not ask for other bids, he was not put on notice that Cobb was asking a suspiciously low price. Unless Cobb can show another reason why he should have known of the mistake, Cobb must bear the consequence of his own error. Since the error is not a hardship unforeseen at the time of formation, it also does not provide the defense of impracticability. Thus, Cobb is liable for breach of contract. (Note: We are assuming the contract is a valid bilateral contract where the performance of the work is a condition precedent to the payment of the $18,000 balance of contract price.)

The judge was also correct in saying Cobb can recover. Restitution requires that a party -- even a breaching party -- be reimbursed for benefit confined on the non-

breaching party. The reimbursement is diminished by any damages the non-breacher sustained because of the breach. This prevents unjust enrichment.

What amount should Cobb recover? Since the contract price was $20,000 and the work was half done, Cobb would recover $10,000 less the $2,000 he has already received. Under this calculation, the $8,000 is correct.

However, for this to be correct, it must be shown that that was indeed the benefit confined since Cobb is not recovering on the contract but in restitution. Apparently, the judge thought this was an accurate calculation of benefit confined.

2. Damages Owing to Owen

Owen did what a non-breaching party is supposed to do -- he promptly tried to obtain substitute performance at a reasonable price. (The fact that he sought out bids indicates a reasonable price.) Then, he mitigated his damages (did not incur unnecessary costs). Contract damages allow the non-breaching party to recover his expectation damages (i.e., to get the benefit of the bargain). In this case, the difference between the contract price and the price of substitute performance equals expectation damages.

The substitute performance of the remaining half of work to be done cost Owen $15,000 more than the contract price. The judge was correct, therefore, to name it as the damage.

Cobb may assert that the $1,500 to replace the incorrect paneling should not be counted toward the damages.

It is clear that Cobb breached the contract in relation to the quality of paneling. The damages for breach in quality of performance (such as paneling) is measured by the repair/replacement cost or the diminution in value. The former is available unless it would be wasteful because of the disproportionate cost of repair/replacement to the actual worth/diminution in value.

While, in this case, it is not clear whether the repair/replacement was disproportionate and wasteful, the court was probably right in deciding it was not. Fifteen hundred dollars, while a hefty sum, is not hugely disproportional to the whole home. Furthermore, the paneling provisions are for personal preferences in a living area (alien to "satisfaction" provisions in contracts). Courts tend to enforce such personal preferences because, by their nature, they deal with taste, and parties are deemed to have the right to specific fulfillment of their tastes in contract settings such as personal homes. Thus, the inclusion of the $1,500 replacement job in the damages (as opposed to off-setting diminution in value against Cobb's recovery) is correct.

3. Liquidated Damages

Claims for liquidated damages replace actual damages calculations. They are enforceable, however, only if they are not a penalty. This is because the law favors an efficient breach where it is more cost-efficient for both parties to breach and pay damages than to perform. Penalties prevent cost-efficiency.

To be valid, a liquidated damages claim must 1) be for damages that are hard to predict at the time of the contract formation, and 2) that are a reason-able prediction at the time of the contract of actual damages.

The $500 damages/month of delay in the contract is a liquidated damage claim. The court's refusal to enforce it is based on the correct judgment that it is a penalty rather than an estimate of actual damages. Since Owen lived in the home during the remodeling, he apparently did not incur any costs for

rent, etc. for living elsewhere. There is no evidence that a delay in completion cost him anything more than inconvenience (or that he anticipated it Would cost him anything more). Thus, the provision was intended to prevent delay rather than to compensate anticipated costs associated with it. As such, it is a penalty claim and unenforceable.

February 2001

QUESTION 4

In 1998, Diane built an office building on her land adjacent to land owned by Peter. Neither she nor Peter realized that the building encroached about ten inches on Peter's adjacent property. Because of the narrowness of Diane's lot, Diane did not have much latitude in the design of her office building. In December 2000, a town survey made for other purposes revealed the mistake. In constructing her office building, Diane inadvertently destroyed two dozen ornamental trees that had been on Peter's land for years.

Peter, who was a restaurateur, maintained a garden where he grew specialty vegetables for his restaurant. The vegetables have been unable to flourish without the filtered sunlight provided by the trees that Diane destroyed. As a result, Peter's costs have risen as he has been forced to buy more produce from suppliers. In addition, his reputation as a restaurateur has suffered because his customers had come to look forward to his fresh garden vegetables. Many of his customers have begun to frequent other restaurants, and the long-term effect on his business is incalculable.

Diane has had tenants in her building since it opened in 1998, and most of them have leases covering several years. To remove the encroaching wall would be costly to Diane, would reduce the office space, and would disrupt the tenants on the encroaching side of the building sufficiently that they could claim a constructive or even an actual eviction.

Diane's tenants have been parking on a lot in back of Diane's building. Diane paid for the paving of the lot under the mistaken belief that the lot was on her land. In reality, the lot is almost entirely on Peter's land. Diane has been charging her tenants

$50 a month to lease parking space in the lot. Peter has never voiced any objection to this practice because, until the town survey, he did not realize that the lot was on his land.

What remedies are available to Peter against Diane, and on what theories of liability are they based? Discuss.

ANSWER A TO ESSAY QUESTION 4

The issue is what remedies Peter has against Diane for the damages to his restaurant business and the trespass on his property, and on what theories of liability he may base his claims. Peter has three causes of action for Diane's (1) encroachment on his property, (2) destruction of his trees and interference with his vegetable garden and the consequential damage to his restaurant business, and (3) use of Peter's land as a parking lot.

1. Peter v. Diane for encroachment of Diane's building on Peter's property Theories of liability

Peter may bring a claim against Diane for trespass of land, which is the defendant's intentional entering of plaintiff's real property. Whether the defendant knew that he or she was trespassing on another's property is irrelevant for purposes of

determining intent. As long as the defendant intended to enter the land, an action for trespass of land lies. Here, Diane built an office building on her land, but which encroached about ten inches on Peter's adjacent property. While Diane did not know at the time she had encroached onto Peter's property, and did so only because her lot was so narrow and did not have much latitude in the design of her building, she had, in fact, intentionally built her structure so that, in effect, it did encroach on Peter's property.

Therefore, Diane has trespassed onto Peter's property and she is liable for trespass of land.

Legal remedies: Damages

Usually, for non-possessory trespass, the only remedy available is nominal damages, which are damages merely to vindicate the plaintiff's legal right. These are damages awarded in the absence of a showing of actual damages. While Peter's legal rights as to his property were violated, here, however, there is a continuing or permanent trespass, for which Peter may pursue a number of remedies.

Peter may pursue compensatory damages for Diane's encroachment on his land. Compensatory damages are a measure of the harm done to the plaintiff. There must be actual causation, proximate causation, certainty of the value of damages, and unavoidability. Here, Diane's ten inch encroachment on Peter's land is the actual and proximate cause of her trespass on his land. The certainty of the damages can be measured by the value of the land. Finally, there is little Peter could have done to avoid or mitigate Diane's damages because he did not know that Diane was encroaching on his land at the time.

Punitive damages are not likely to apply since Diane's conduct was not malicious or willful.

Therefore, Peter may pursue compensatory damages in the form of rental value for the land, or a measure of diminution of value of his land.

Legal restitutionary remedies: Ejectment

Ejectment is a legal action that the plaintiff may take to reclaim real property to which he or she has a legal right of possession, and which the defendant is wrongfully and actually possessing. Here, Peter has a legal right of ownership of the ten inches of land on which Diane has encroached and is wrongfully and actually possessing the presence of her building.

Therefore, Peter may seek and ejectment action to force Diane to remove the ten inch encroachment on his land.

Equitable remedy: Injunction

Peter may also seek to enjoin Diane from using his land. Peter must show that there is an inadequate legal remedy alternative, that he has a property right or protectable interest, that enforcement is feasible, that the balancing of hardships weighs in his favor, and that there are no defenses that can be asserted against him.

First, Peter will have to show that money damages do not adequately address his injury. Here, Diane has encroached about ten inches onto his property. Because the facts do not indicate that the ten inch encroachment caused any other damages besides the trespass on his land (the fact that the building itself caused other consequential damages will be discussed below), money damages will probably be adequate.

Second, Peter clearly has a property right on the ten inch encroachment. Therefore, Peter will win on this point.

Third, enforcement is not likely to be feasible because the sheriff, in an ejectment or injunctive action, is not likely to order Diane to tear down her building in order to stop

encroaching on Peter's land. Therefore, Peter will most likely lose on this point.

Fourth, the balancing of hardships is likely to weigh in Diane's favor. Here, Diane has encroached only about ten inches on Peter's land. On the other hand, Diane has had tenants in her building since it opened in 1998, and most of them have leases covering several years. To remove the encroaching wall would be costly to Diane, would reduce the office space, and would disrupt the tenants on the encroaching side of the building sufficiently that they could claim a constructive or even an actual eviction. Therefore, Diane would not only suffer damages to her building, but would suffer long-term fallout from tenants leaving and justifiably breaking their leases. Because the harm to Diane is great and the harm to Peter is relatively small, Peter is likely to lose on this point.

Finally, Diane may assert laches in that Peter should have surveyed the land during construction of her building. She will likely lose on this point because neither she nor Peter realized the building had encroached about ten inches.

In conclusion, the balancing of hardships will most likely prevent Peter from seeking an injunction. Therefore, money damages, as discussed above, will most likely suffice for Peter.

2. Peter v. Diane for destruction of Peter's ornamental trees and blocking of filtered sunlight and harm to restaurant business

Cause of action

Peter may assert an action for conversion for the destruction of the ornamental trees that had been on his land for years. Conversion is where the defendant interferes with and damages plaintiff's chattel to such a point that it warrants forcing defendant to pay the fair market value of the chattel at the time of conversion. Here, Diane, although inadvertently, destroyed two dozen ornamental trees that had been on Peter's land for years. Because she destroyed the trees, she is liable for conversion.

Legal remedies: compensatory damages

Peter may seek compensatory damages for the loss of his trees. Diane's actions were the actual and proximate cause, and are certain and unavoidable. Therefore, Peter may seek the fair market value of the trees at the time at which Diane destroyed them.

In addition, Peter may seek damages to his garden. Because the trees were destroyed, the vegetables have been unable to flourish without the filtered sunlight provided by the trees. The damages are readily calculable and certain based on the past production from the garden. However, Diane may successfully argue that Peter had a duty to mitigate the damages by obtaining new trees or trying to find some other means of providing filtered sunlight to his vegetables. Therefore, Peter's recovery for the garden may be reduced.

As for the harm to the restaurant, Diane will argue that those damages cannot be ascertained with certainty. Peter may be able to calculate the rise in costs as he has been forced to buy more produce from suppliers. Determining the certainty of damages requires looking at past historical performance date or calculating future damages with an all-or-nothing "more likely than not" rule. Calculating the damage to Peter's reputation and other long-term effects to his business is "incalculable." Therefore, lacking any degree of certainty, Peter is not likely to recover for the damage to his reputation and long-term reputation to his business.

Punitive damages are not likely to apply since Diane's conduct was not necessarily willful or malicious.

4. Peter v. Diane for Diane's use of Peter's land **as a parking lot** Cause of action

Peter may assert an action for trespass of land for the use by Diane's tenants of a

lot behind Diane's building for a parking lot, which was in fact Peter's land. Here, even though Diane paved the lot under the mistaken belief that the lot was on her land, she is still liable for intentionally entering the land and paving the lot on it, because she intentionally entered Peter's land.

Legal remedies: damages

Peter may seek compensatory damages. These damages must arise from Diane's proximate and actual actions that caused the damage, and must be certain and unavoidable. Here, Diane paved over part of Peter's land, causing damage. She has also used Peter's land, incurring rental value of the land. Therefore, Peter may seek compensatory damages for both the damage done to his land and for the rental value of her using his land.

Punitive damages are not likely to apply since Diane's conduct was not malicious or willful.

Restitutionary remedies: restitution

Peter may recover more, however, if he files for restitutionary damages. Restitutionary damages are a measure of the benefit that the defendant has gained from the injury committed on the plaintiff, while compensatory damages are a measure of the damage to the plaintiff. Here, Diane has been charging her tenants $50 a month to lease parking space on the lot. Therefore, Peter may be able to recover that proportion of the parking lot leasing fees as was on his land, so as to avoid unjustly enriching Diane.

ANSWER B TO ESSAY QUESTION 4

I. Encroachment of Diane's office Building

Liability

The first issue is whether Diane (D) is liable to Peter (P) for her encroachment. Neighboring landowners can be liable for encroachment whenever the improvements on their land physically intrude onto the property of another. Here D's building clearly counts as such an intrusion and the slightness of the intrusion

(10 inches) does not prevent the encroachment from being actionable. Neither is D's liability affected by her inadvertence [n]or the fact that she had little latitude in the construction of her building (although her inadvertence ensures she may not be sued for a trespass to land). Therefore, P may sue D for encroachment.

P's remedies for the building

Compensatory Damages

The next question is how much damage P is entitled to collect. The damages typically awarded for an encroachment depend on the duration of the encroachment. Where an encroachment is permanent, P will be awarded the market value of the encroachedupon land. Where the encroachment is only temporary, P will be given the fair rental value of the encroached land for the duration of the encroachment. Further, to collect damages, one must show that D's acts were the factual and legal cause of the damage, that the damage can be calculated with reasonable certainty, and that they have taken all appropriate steps in mitigation.

On these facts, D's encroachment is likely permanent (but see injunction below) and D can seek the market value of the taken land. Cause will be established by D's conduct, and P has no realistic means to mitigate. As to certainty, D would like[ly] take the fair market value of his entire tract, as determined by some reasonable means, perhaps by consulting a professional estimator, and divide it by the percentage of land D encroaches.

Punitive Damages

Punitive damages are intended to punish D for the wrongful conduct. Punitive damages

can only be awarded, however, when D has acted willfully in the damaging of P's property. Here, D's acts appear to be inadvertent in every regard, so punitive damages will not be awarded.

Restitutionary Damages

P may also be entitled to collect the benefit D has enjoyed from the wrongful intrusion upon his land. Restitutionary damages are awarded to P where D has been unjustly enriched by some wrongful conduct, in the amount of that enrichment. Again, P could take the rental value of the tenements on the encroaching portion of the building and try to calculate the amount their rent would have to be reduced were it not for the extra space of the encroachment. This calculation presents serious certainty problems for P.

It should also be noted that P must elect whether to collect actual or restitutionary damages, and cannot collect both. P should select whichever method offers the greatest result, or, if either method cannot be proved to sufficient certainty, should select the one that can be.

Equitable lien

If P does get a restitutionary award and D refuses to pay, or is somehow unable to, P may also seek to place an equitable lien on D's bank accounts, in the amount of the award. An equitable lien entitles a plaintiff to collect money from the other party without their consent, by giving the plaintiff a secured interest in the other's money.

Injunction

The next important issue is whether P will be able to compel D to remove the

encroaching portion of her building. A court in equity can order an injunction of this kind where the plaintiff's remedies at law are inadequate, plaintiff has a legitimate property interest, the court has jurisdiction of the subject matter, making the award "feasible," the balance of the hardships tips in the plaintiff's favor, and the defendant has no equitable defenses.

Inadequate remedies

D will argue that an award of money damages or restitutionary damages to P is adequate to compensate him for his loss. P will argue that because his loss is in real property, and all real property is unique, damages are rarely if ever adequate in such cases. The court will likely rule with P that damages cannot adequately compensate one for a loss of real property.

Feasibility

From these facts, it appears that the two properties and both parties all reside in the same state. In such a case, there are no barriers to a court enforcing its orders. If, however, either party were from a different state or the properties were somehow straddling state lines, there could be a problem with [the] court ordering an injunction.

Balancing of the hardships

Balancing allows the court to weigh the respective damage that each party will incur if the injunction is granted or if it is denied. Balancing is considered especially appropriate in cases of encroachment and nuisance.

Here, the encroachment is rather small and P is suffering little harm from his inability to use this 10 inches of his land. If P had some plans for his land that the encroachment were somehow preventing, that would weigh in his favor, but on these facts, his

hardship is not great.

D by contrast will likely incur great costs to abate the encroachment. It is certainly possible that her building will have to be torn down entirely. At a minimum, her tenants on that side of the building will have to leave their tenancies for a substantial period and tenants in the rest of the building will have to tolerate the noise and commotion of ongoing construction. D will likely suffer great economic harm if such an order is given.

Equitable defenses

There are no obvious equitable defenses (e.g., unclean hands, laches) presented by these facts. It seems that both parties acted in good faith and were simply unaware of the boundary lines.

II. Conversion of the trees

P can also sue D for the destruction of the trees on his property. A case of conversion will be made out where one intentionally destroys or otherwise substantially damages the property of another. Here, D's conduct was "inadvertent" so an action for conversion will not lie.

Negligence as to the trees

P may also sue if D was negligent in the destruction of the trees. Negligence requires a duty between the parties that is breached, causing damage. Here, neighboring landowners owe each other a duty to perform construction competently, but the facts do not indicate whether D was negligent in the destruction of P's trees. However, under the doctrine known as res ipsa loquitor P can still collect on a negligence theory where 1) the instrumentality of harm was under D's exclusive control, 2) the type of harm is one that would not normally

occur without negligence and 3) P was not at fault. Since D was responsible for the construction, negligence will likely be presumed under res ipsa loquitor.

P's remedies

Comaensatory damages

P may collect for the value of the trees under the same rules announced above.

Damage to garden

Whether P may also collect for the rising costs of tending his garden turns on issue of causation, certainty and mitigation. Again, P will have to show that the absence of the trees caused his gardening problems, he will have to establish a reasonable means of calculating his costs, and will have to prove that there were no steps he might have taken to lessen his damage (e.g., erecting an alternate source of light filtration). In the end, the court would likely permit P to collect for his gardening costs.

Damage to P's business

P's right to collect for his lost business also presents serious certainty and causation problems. P's position will be substantially enhanced if his business has been in existence for a long time. The damages to the reputation of a newer business are frequently regarded as too speculative to be awarded by the courts. P must also show clear causation. D will likely look to the surrounding community and any general decline in restaurant revenues to explain P's losses. In the end, the court should rule that the damages are too speculative.

Restitutionary damages

P may not collect restitution as D was not enriched by the destruction of the trees.

111. Encroachment by the parking lot

Damages

P may collect for damages on the same theories explained above for encroachment. That is, P will get the fair market value of the land encroached, unless there is an injunction to remove the parking lot, in which case he will get the fair rental value of the land while it was covered.

Restitutionary damages

P may also elect to collect from D the amount by which the parking lot has enriched her. This would be a relatively simple calculation, given that D has been charging her tenants for use of the parking space. That is, P's case that these amounts are certain is a strong one.

Ejectment

P could also seek to simply have D and her tenants forbidden from returning onto the land, which is almost entirely his. If he were successful, he could theoretically use the lot for his own purposes. However, D would likely be able to recover in quantum meruit for the amount she has enriched D's land with her construction of the parking lot. P will argue that because she's a trespasser, she is entitled to no recovery. On these facts, the court would likely allow D to recover for the amount she benefited P.

Equitable lien

Under the principles explained above, P might get an equitable lien on D's accounts to ensure prompt payment of the restitutionary damages he may be entitled to.

Injunction to remove the lot

On the same factors explained above, P could seek to have the lot completely removed.

Inadequate remedy
Again, an interest in land is considered "unique" and any payment of a large swath of

the land like this would be considered inadequate.

Balancing of the hardships
This calculation weighs far more strongly in P's favor than did the building. Here, D has taken a large portion of P's land, impairing his rights substantially. By contrast, D's only hardship will be the removal of the offending improvement and the loss of income it provides. D may also note that she may lose tenants if she has to give up the lot, but these hardships are all ones D brought on herself, and she cannot avoid them at P's expense.

Conclusion
Therefore, the court would give P an injunction, ordering D to remove the lot from his

land.

July 2003
Question 2

In 1993, Polly and Donald orally agreed to jointly purchase a house on Willow Avenue. They each contributed $20,000 toward the down payment and jointly borrowed the balance of the purchase price from a bank, which took a first deed of trust on the property as security for the loan. Polly paid her $20,000 share of the down payment in cash. Donald paid his $20,000 with money he embezzled from his employer, Acme Co (Acme).

Polly and Donald orally agreed that the house would be put in Donald's name alone. Polly had creditors seeking to enforce debt judgments against her, and she did not want them to levy on her interest in the house. Polly and Donald further orally agreed that Donald alone would occupy the property and that, in lieu of rent, he would make the monthly ban payments and take care of minor maintenance. They also orally agreed that if and when Donald vacated the property, they would sell it and divide the net proceeds equally.

Donald lived in the house, made the monthly loan payments, and performed routine maintenance.

In 1997, Acme discovered Donald's embezzlement and fired him.

In 1998, Donald vacated the house and rented it to tenants for three years, using the rental payments to cover the loan payments and the maintenance costs.

In 2003, Donald sold the house, paid the bank loan in full, and realized $100,000 in net proceeds. Donald has offered to repay Polly only her $20,000 down payment, but Polly claims she is entitled to $50,000.

Having made no prior effort to pursue Donald for his embezzlement, Acme now claims it is entitled to recover an amount up to the $100,000 net proceeds from the sale of the property, but, in any case, at least the $20,000 Donald embezzled. Donald has no assets apart from the house sale proceeds.

What remedies, based on trust theories, might Polly and Acme seek against Donald as to the house sale proceeds, what defenses might Donald reasonably assert against Polly and Acme, and what is the likely result as to each remedy? Discuss.

Answer A to Question 2

Polly's Remedies Against Donald

Constructive Trust

A constructive trust, an equitable remedy, is a court-ordered obligation for one party who has been unjustly enriched at the expense of another to return the relevant property or assets to the injured party. To be entitled to an equitable remedy, a plaintiff must show that all legal remedies are inadequate. One of the situations in which a constructive trust has been used as a remedy by courts is that of an invalid oral agreement (i.e., one unenforceable at law) that is induced by fraud. Here, Polly and Donald entered into an oral agreement concerning the house they purchased together. Any agreement concerning the land must comply with the Statute of Frauds. Because the agreement between Polly and Donald was oral, it violated the Statute of Frauds [and] is therefore unenforceable at law. However, Polly can successfully argue that the

agreement was induced by Donald's fraud. It appears from the facts that Donald made the oral promise to equally split proceeds from the sale of the house in order to get Polly to put up $20,000 for the down payment and that he never planned to abide by this agreement. When Donald ultimately sold the house for $100,000, he reneged on the agreement he had made with Polly, offering Polly her initial investment of $20,000. This resulted in unjust enrichment to Donald. Finally, Donald has no assets apart from the house sale proceeds. Where a defendant is insolvent, damages are not available and a court will look to equitable remedies such as a constructive trust. Because of Donald's fraud, unjust enrichment at Polly's expense, and insolvency, a court could feasibly impose a constructive trust on half of the proceeds from the sale of the house in favor of Polly.

Purchase Money Resulting Trust

Where one party has provided all or part of the consideration for purchase of property, but title to the property is taken in another party's name, a resulting trust will be imposed in favor of the party that has provided the consideration. Where the title holding party sells the property to a third party, the party providing consideration may impose a resulting trust on the consideration the title-holder received in exchange for the property. Here, Polly supplied half of the downpayment for purchase of the house, but title was taken in Donald's name only. Therefore, half of the house was held in a purchase money resulting trust for Polly. When Donald sold the house, half of the consideration he received for it ($100,000) would be subject to a resulting trust of which Polly is beneficiary. Polly would therefore be able to prevail on a purchase money resulting trust theory as well.

Donald's Defenses

Donald could assert a number of equitable defenses to the equitable remedy of constructive trust.

Unclean Hands

The unclean hands defense asserts that the plaintiff should not be entitled to equity because she herself has engaged in a wrong in the transaction for which she claims injury. Here, Donald could claim that Polly's having creditors seeking to enforce debt judgments against her, and thereby asking Donald to put the house entirely in his name, constituted unclean hands. However, Polly's debt issues are unrelated to Donald's fraudulent conduct. There is no suggestion that Polly engaged in any wrongful conduct in her dealings with Donald. Therefore, this defense will likely fail.

Laches

The laches defense asserts that a plaintiff cannot bring an action once an unreasonable amount of time has passed after the injury and the delay has somehow prejudiced the defendant. Here, Donald will argue that he and Polly had agreed that, upon Donald's

vacating the house, the property would be sold and the net proceeds divided equally. Donald vacated the house in 1998. However, at that time, Polly did not insist on the house being sold. After renting the house for five years, Donald finally sold it in 2003. Donald will argue that Polly's claim was actionable in 1998, but that she waited five years before bringing it. Donald will argue that five years is an unreasonable amount of time to wait before bringing the lawsuit and that he will be prejudiced by the delay. However, Polly can argue that the substantial part of the injury to her was sustained not in 1998, when Donald vacated the house and did not immediately sell it, but in 2003, when Donald sold the house and withheld Polly's rightful half share of the proceeds. This agreement will be successful, as Polly did not sustain a sustainable financial injury until Donald's 2003 withholding of the sale proceeds. Therefore, Donald is unlikely to prevail in establishing the laches defense.

Acme's Remedies Against Donald

Constructive Trust

Acme could seek the imposition of a constructive trust on Donald's proceeds from the sale of the house. Where a party has obtained property through fraudulent conduct, courts will impose a constructive trust on the defrauding party's property to prevent unjust enrichment. Here, Donald used funds he had embezzled from Acme to purchase the house and was thereby unjustly enriched. Aside from the proceeds from the sale of the house, Donald is insolvent. Therefore, a court could rightfully impose a constructive trust on Donald's half of the proceeds from the sale of the house.

One issue is whether the constructive trust would be imposed only to the extent of the $20,000 Donald embezzled from Acme or to the extent that Donald benefited from the embezzlement, i.e., the full amount (or at least his half share) of the proceeds from the sale. Where a party is unjustly enriched at another's expense, restitution will be in the amount of the benefit to the unjustly enriched party. Because Donald benefited at least $50,000 from the sale of the house, and because this benefit would not have been possible without the $20,000 Donald initially embezzled from Acme, Acme will be entitled to Donald's half share in the net proceeds from the sale of the house. Acme is not entitled to the full $100,000, however, since this would lead to an inequitable result for Polly, who put up half of the downpayment and entered into an agreement with Donald for half of the proceeds.

Purchase Money Resulting Trust

Acme could also assert the remedy of purchase money resulting trust. Here, Acme unknowingly provided the consideration for Donald's purchase of the house. Title to the house was taken in Donald's name only. Donald therefore held his interest in the house in resulting trust with Acme as the beneficiary. When Donald sold the house, one half of the consideration Donald received would likewise be held in a resulting trust with Acme as the beneficiary. A court would likely award this remedy to Acme.

Donald's Defenses

Unclean Hands

There is no plausible basis on which to assert that Acme had unclean hands. To the contrary, Donald embezzled funds from Acme. Acme was a victim of Donald's fraud and perpetrated no fraud of its own.

Laches

Donald will assert that, because Acme discovered Donald's embezzlement in 1997 but did not bring the action until 2003, that the laches defense applies. Laches applies when an unreasonable time elapsed between the injury and the action and where this delay would result in prejudice to the defendant. Here, Acme let six years elapse between its discovery of the injury and its action against Donald. A court would likely conclude that six years is an unreasonable length of time which prejudiced Donald, since Donald likely proceeded on the reasonable belief that Acme did not plan to press charges for the embezzlement. Therefore, Donald's laches defense against Acme will likely be successful.

Answer B to Question 2

Polly:

Polly will assert a theory based on resulting trust. A resulting trust arises when one person takes title in his or her name for the benefit of the person who paid for the property. The presumption is that the one who paid for the property could not have meant to make a gift of the property to the one who takes title. The presumption does not apply when the parties are closely related; however, there is no evidence here that Polly and Donald are related, married, or otherwise within that presumption.

Here, both Polly and Donald contributed to the purchase price, yet title was taken in Donald's name alone. From that point on, Polly made no more payments on the property. However, she and Donald did have an oral agreement that in lieu of paying rent, he would make the monthly loan payments to the bank on their deed of trust. So she contributed to the purchase price, while title was taken in Donald's name alone. Therefore, equity should consider title to be in the name of both Polly and Donald.

Therefore, when Donald sold the property, Polly had a right to her portion of the proceeds. Their other oral agreement about vacating the property, selling and splitting the net proceeds, would not even be a factor. Polly is entitled to her share on the basis of the resulting trust.

Donald's Defenses:

First, Donald may argue for application of the "unclean hands" doctrine. This is an available defense to any equitable action. It states that someone may not avail himself of equity where the person's behavior was wrongful in that particular transaction on which the person is seeking relief.

Here, Polly and Donald made their original agreement in order to defraud creditors of their right to enforce their judgments against her. That is why they took title in Donald's name alone. So Polly should not be allowed to now seek an interest in the property due to her "unclean hands."

But the unclean hands doctrine is not available as a defense where the defendant profited from the plaintiffs wrongful behavior. Here, Donald did profit-he got title to the property, and it was not levied by Polly's creditors. Since Donald received a benefit, he will not be allowed to assert unclean hands, despite Polly's wrongful behavior.

Donald will also assert the statute of frauds as a defense. The statute of frauds requires that any contract for the sale of an interest in land must be in writing. Here, the oral agreement that Polly and Donald initially made was not in writing. However, that contract was not a contract relating to the sale of an interest in land-it was only a contract about how they would jointly purchase the house. Therefore, the statute of frauds is no bar to the action.

Polly:

Polly can also assert a constructive trust theory. A constructive trust is imposed on a person to prevent unjust enrichment by that person where, for example, the property is obtained or held wrongfully.

Polly would seek to impose a constructive trust on the proceeds of the sale, which should have been split between them on the basis of their agreement to sell and divide the proceeds whenever Donald should move out.

Donald vacated the property in 1998 and the property should have been sold then and the proceeds divided. That did not happen. Therefore, when it was sold (in 2003) the proceeds should still have been divided. Donald is wrongfully holding Polly's half of the proceeds, and so a constructive trust should be implied on Donald to hold those proceeds and convey them to Polly.

Donald's Defenses:

Donald may assert a defense of laches. Laches is an equitable remedy, available in all cases where the plaintiff is seeking equitable relief. It bars an action where the plaintiff has unduly delayed seeking relief, causing prejudice to the defendant.

Donald will argue that he breached their oral contract in 1998, when he moved out and began renting to tenants. It was not until 2003 that Polly sought relief for the breach.

However, the unjust attachment stems from the 2003 sale of the property, not the initial breach by not selling the house in 1998. Polly could have (and likely did) waive any right to immediate sale of the property upon vacating. But she still remained entitled to her share of the proceeds, at whatever time the sale occurred. So Donald's laches defense will probably fail.

The same outcome is likely for any statute of limitations defense Donald might raise, based on the same analysis.

Donald may also argue for the statute of frauds as a defense. This was a contract for the sale of an interest in land. Therefore, it needs to be in writing.

But again, this contract was collateral to the sale of an interest in land. It did not involve the actual sale, only an agreement of what to do with the property and the proceeds of that property at a certain time upon the happening of a certain condition. The statute of frauds will probably not work as a defense for Donald either.

The bottom line is that Donald has the title in the property and/or its proceeds as a result of his own wrongful behavior. In all likelihood, a court will not allow him to profit from his own wrongdoing, and so Polly will be successful. She will get $50,000, not just $20,000.

Acme:

Donald wrongfully converted the $20,000 of Acme when he embezzled it and used it to purchase the Willow Avenue home. Therefore, Acme could seek a constructive trust on the premises, and therefore the proceeds of the sale of the home.

Since Donald wrongfully used Acme's funds to acquire title to the property, Acme will argue that those funds should be traced to the property itself. Therefore, a construction trust should be imposed in its favor on the entire property. This is not a case where Donald used the embezzled funds to benefit property he already owned-he acquired his

interest in the property due to the embezzled funds.

But a court in equity would probably not allow Acme to impose a constructive trust on the entire property. What is more likely is that (due to Polly's interest) the court would impose a constructive trust on only Donald's portion of the ownership interest. Therefore, if Donald owns one-half of the house, the constructive trust would be on one-half of the proceeds, or $50,000.

It is also possible that instead of a constructive trust, the court might impose an equitable lien on the property (and consequently the proceeds). Since Donald (and Polly) both contributed other funds to the purchase of the ho me, Acme's equitable lien would only give it an interest in the property to secure the repayment of the funds Donald misappropriated $20,000. If an equitable lien is imposed, then Acme would get that amount from the proceeds: $20,000.

Donald's defenses:

The two biggest defenses available to Donald against Acme are laches and any applicable statute of limitations.

Laches (as indicated previously) is about unreasonable delay causing harm or prejudice to the defendant. Laches begins to run from when the plaintiff has reason to know of the injury. Here, the embezzlement occurred in 1993, but Acme is only now suing in 2003. If laches begins to run from 1993, there is probably prejudice to Donald; he has purchased the property and made additional payments and maintenance on it. Therefore, laches would likely bar the suit.

But Acme only discovered the embezzlement in 1997, at which time it fired Donald from its employ. If laches begins to run from this date (as is more probable), then there is less reason to apply the defense. Donald has not really been prejudiced from that time until the present. The most likely outcome is that laches will not prevent the relief being sought by Acme.

An applicable statute of limitations also could run from either date, 1993 or 1997. There is no requirement of harm to defendant, so if the applicable statutory period has expired, that would be a complete defense for Donald.

July 2005
Question 5

Stan and Barb entered into a valid written contract whereby (1) Stan agreed to convey to Barb 100 acres of agricultural land and water rights in an adjacent stream, and (2) Barb agreed to pay Stan $100,000. When Stan and Barb were negotiating the deal, Stan said, "You know I want to make sure that this property will still be used for farming and not developed." Barb replied simply, "Well, I can certainly understand your feelings." In fact, Barb intended to develop the land as a resort.

The conveyance was to take place on June 1. On May 15, Stan called Barb and told her the deal was off. Stan said that a third party, Tom, had offered him $130,000 for the land. Stan also said that he had discovered that Barb intended to develop the land.

On May 16, Barb discovered that Stan has title to only 90 of the 100 acres specified, and that he does not have water rights in the adjacent stream.

Barb still wishes to purchase the property. However, it will cost her $15,000 to purchase the water rights from the true owner of those rights.

What equitable and contractual remedies, if any, may Barb seek, what defenses, if any, may Stan assert, and what is the likely outcome on each? Discuss.

Answer A to Question 5

5)

Barb v. Stan

Barb's Equitable and Contractual Remedies

Contractual Rights - - Land-Sale Contract
Barb can sue Stan under contract rights for breach of the land-sale contract, for failing to deliver marketable title and for breach of a general warranty deed. She should assert that she is entitled to the remedy of specific performance, or alternately, damages under contract.

Specific Performance
Specific performance is an equitable remedy that is available when: 1) there is a valid contract, 2) the terms of the contract are clear and definite and were performed, 3) there is [sic] inadequate legal damages, 4) there [sic] mutuality, and 5) there are no valid defenses.

Valid Contract
A valid contract in a land-sale agreement requires a writing with all essential terms.

The contract between Barb and Stan was a valid written agreement, for the sale and purchase of 100 acres of agricultural land and water rights to a stream, to close on June 1S'. Barb agreed to pay $100,000 for the purchase of the land.

Clear and Definite Terms
Terms are clear and definite when a court is able to enforce the terms. For a land-sale contract, the contract must contain: 1) parties, 2) property defined, 3) time for performance, and 4) purchase price.

Here, the court can enforce the sale of land, since it defines 1) the parties are Barb and Stan, 2) the land to be sold is 100 acres of agricultural land and water rights, 3) the time for performance as June 1S', and 4) the purchase price of $100,000. Therefore, this element is met.

Inadequate Legal Damages
Legal damages are inadequate when there is a contract for a subject matter that is unique. Land has been held as a unique subject matter, since no two lots of land are the same, even if they appear to be.

Since the contract between Barb and Stan is for 100 acres of land, the contract is for a unique subject matter and legal damages are inadequate. Therefore, this element is met.

Mutuality
At common law, mutuality required that both parties be entitled to specific performance. However, modernly, mutuality only requires that the person seeking specific performance be ready and able to perform.

Here, as long as Barb, the person seeking the specific performance of the contract, is able to pay the purchase price, she should be entitled to specific performance.

Abatement of Purchase Price
In a land-sale contract, a purchase price can be abated, or reduced when the title rendered is defective due to an encumbrance or unmarketable title, or a conveyance of less than promised.

If Barb succeeds on specific performance, subject to Stan's defenses (discussed below) then she should be entitled to abate the purchase price. Bob contracted for 100 acres of land and water right[s] to an adjacent stream. Barb later discovered that Stan only owned 90 acres and did not own the water rights he claimed to own. Since Barb contracted to pay $100,000, she should be entitled to a reduction of the purchase price to reflect the value of the land, minus the 10 acres and the stream.

Stream
The stream was not owned by Stan, but owned by another person who is willing to sell the stream to Barb for $15,000. Therefore, the purchase price should be first reduced by the amount, to a total of $85,000. This is fair since it would cost Barb that amount to correct the contract as agreed.

10 Acres
Stan agreed to sell Barb 100 acres, but only owned 90 acres of the land. The ten acres of land should be subtracted from the remaining $85,000. One method of doing this would be to divide $85,000 by 100 and value each acre at $850. Then multiply $850 x 10 acres for a reduction of $8,500 credited to Barb.

Legal Damages
If Barb is unsuccessful in her attempt to obtain specific performance, she could sue Stan for breach of contract and obtain legal damages.

Breach of the Contract-Anticipatory Repudiation
Anticipatory repudiation is a clear and unambiguous statement that a party will not perform before performance comes due under the contract.

Since Stan called off the sale of the land on May 15, which was two weeks before the closing date of June 1s^{t}, Stan anticipatorily repudiated the contract, which is a major breach. This entitles Barb to suspend her performance and sue for breach of contract.

Expectancy Damages
A major breach entitles the aggrieved party to damages to make them whole. These are

called expectancy damages. In these contracts, the appropriate measure of damages is the fair market value of the land - - the contract price.

Here, Barb contracted for the sale of land for $100,000. Stan was later offered $130,000 for the land by a third party. If indeed this contract reflects fair market value and if the contract was also for the 100 acres and the water rights, then Barb should be granted $30,000. Otherwise, Barb should get $30,000 plus $15,000 for the water rights plus $8,500 to reflect the additional 10 acres.

2) Stan's Defenses
Stan should assert defenses that Barb is not entitled to an equitable remedy and that specific performance was inappropriate since there was not a valid contract which Barb had performed.

Laches

Laches bars equitable remedies when a party unreasonably delays and this causes prejudice.

Here, there is no indication that Barb delayed in filing her suit. Therefore, this defense will fail.

Unclean Hands

Under the Clean Hands Doctrine, equity will not come to the aid of a person with unclean hands. The Clean Hands Doctrine bars equitable relief to a person who engages in wrongful, fraudulent or unconscionable conduct with regard to the subject matter at hand.

Here, Stan could argue that Barb knew of Stan's firm desire to keep the land as agricultural land to be used for farming and prevent its development. In fact, Barb said, "I can certainly understand your feelings," but in reality had intended all along to develop the agricultural land as a resort. Barb did not disclose this information to Stan, which is material omission and one that probably would have terminated the contract. On the other hand, Stan did not include this statement in the contract, and if it were truly a deal-breaker, he probably should have. Since courts tend to favor the free alienation of property and prefer that material agreements be in the writing, if there is one, the court will likely side with Barb, unless they find that she committed fraud against Stan. Therefore, this defense, although a close call, will not likely bar Barb's relief in equity.

Contract Invalid
Stan can also claim the contract is invalid, which would refute one of the elements necessary to enforce an agreement with specific performance.

Unconscionability
Stan should argue that the contract was unconscionable since there was unfair surprise

in Barb's intent to develop the land.

However, this argument will likely fail as Barb and Stan appear to be at arm's length and Stan should have included his restriction on the land.

Terms of the Contract Not Met
Stan can also argue that the contract terms were not met and Barb breached the contract by having the intent to develop the land although there was a condition that Barb use the land with the restriction on the land for agricultural purposes. However, the parol evidence
rule will bar this argument.

Parol Evidence
Parol evidence bars introduction of oral or written agreements make [sic] before or contemporaneously with a completely integrated writing.

Therefore, Barb will argue that the oral statements by Stan that he preferred the property be used for farming and not be developed is barred.

Stan's Bad Faith/Unclean Hands
Since Stan also acted in bad faith and with unclean hands by accepting an offer from another purchaser for more money, he will probably lose on his defense arguments.

Answer B to Question 5

5)

Barb (B) v. Seller (S)
Breach of the Land Sale Contract

Valid, Enforceable Contract

The facts tell us that B and S entered into a valid written contract for the sale of 100 acres of agricultural land and water rights in exchange for $100K.

Anticipatory Repudiation

B will argue that S breached the agreement when he anticipatorily repudiated the agreement on May 15. In order to have an anticipatory repudiation, the breaching party must unequivocally indicate an intent not to perform. In this case, S called B and told her the deal was off. This qualifies as an unequivocal repudiation and S would be free to pursue all remedies available to her for the breach.

B has four options available to her after S's repudiation. She is free to: (1) treat the contract as repudiated and sue for damages, (2) treat the contract as discharged; (3) await the time for performance (June 1) and sue when performance does not occur; or (4) urge S to perform. In this case, we know that B still wishes to purchase the property; thus, her best option is to treat the contract as repudiated and sue immediately for all contractual remedies available to her.

Unmarketable Title

B will also argue that S breached the land sale contract by being unable to provide marketable title. This is because she discovered on May 16 that S only had title to 90 of the 100 acres he was purporting to sell B and because he did not have any water rights in the adjacent stream.

Although S might try to argue that his inability to provide marketable title discharges him from the contract, this will not be a successful defense because only the buyer to a land

sale contract has a right to terminate the contract if the seller cannot provide marketable title. If the buyer still wants to purchase the property, the seller must perform under the contract. In addition, the buyer has a right to sue for damages incurred under the contract. This could include abatement of the purchase price.

Remedies Compensatory

Damages *Expectancy*

Damages

In order to be awarded damages, B must prove that they are foreseeable and certain to result. The usual measure of damages in a contract action is for B's expectancy; that is, B is entitled to recover the amount that she would need to purchase a replacement. In this case, it would be very difficult for B to establish how much it would cost her to purchase comparable property since she specifically wants S's property. Thus, there does not appear to be any way to provide B with an amount that would allow her to buy an adequate substitute. If, however, there were other comparable nearby [sic] for sale, and if S could not obtain specific performance, then she might be able to prove expectancy damages by establishing how much it would cost to purchase that other property. If she could do that, she would be entitled to the difference between what it cost to purchase the replacement property and the contract price ($100K).

Consequential Damages

In addition to expectancy damages, consequential damages are sometimes available in contract actions. These are damages that are unusual, but that were foreseeable to both parties at the time the contract was formed. B will try to argue that S should be liable to her for any lost profits she will suffer as a result of the delay in developing the land for a resort. She'll argue that the substantial delay that will occur because she has to either bring suit to obtain S's land or because she'll have to go find an alternative property will result in significant lost profit damages. Moreover, she will argue that S knew on May 15, before the June 1 performance date, that she intended to develop the land as a resort and that he thus should be liable for all lost profits that she will incur as a result of his breach.

S will successfully argue that B is not entitled to consequential damages for two reasons. First, he will prove that he was not aware of B's plans at the time the contract was formed. The contract was formed at the time the parties signed the agreement, and at that time, S was under the impression B would be using the land for farming. This is evidenced by his statement that he wanted the property to remain undeveloped and to be used for farming and B's response of "Well, I can certainly understand your feelings." S will argue that this did not put him on any kind of notice as to B's intentions and thus he isn't liable for her lost development profits. Second, S will successfully argue that the lost development profits can't be proven with certainty since it is a new business with no prior history of

profits. Since courts are loathe to award lost profits to new businesses, S will also succeed in this argument.

Accordingly, B is entitled to receive the amount it would take to allow her to purchase a new piece of replacement property. However, since land is unique, this is inadequate compensation for B. B will not be able to prove that she is entitled to consequential

damages since they are uncertain and since S was unaware of B's plans at the time the contract was formed.

Incidental Damages

B is always entitled to recover for incidental damages suffered as a result of the breach. In this case, to the extent she can prove what it cost her to search for new property, etc[.], she can recover from S.

Restitutionay Damages

Restitution is an alternative remedy to compensatory damages when the defendant received a benefit and compensatory damages are not the best measure of damages. In this case, S has not actually received any benefit yet. However, B may be able to succeed in her argument that if B is allowed to sell his property to Tom because the court refuses to grant specific performance, then she should be entitled to receive the $30K S was receiving from Tom that was in excess of the amount S was entitled to receive under the contract with B. She can argue that allowing S to retain the additional sum would result in unjust enrichment.

Specific Performance

Specific performance is available only if B can establish that: (1) damages are inadequate; (2) the terms of the contract are definite and certain; (3) it is feasible to enforce the contract; (4) there is mutuality of remedy/performance; and (5) there are not equitable defenses.

Inadequacy

As discussed above, since land is unique and since B can't prove her damages with certainty, damages are an inadequate remedy in this case.

Definite and Certain Terms

Courts do not award specific performance unless the terms are very definite and certain. Here, B will argue the terms are quite certain since she was entitled to receive 100 acres of land and water rights in exchange for $100K. She will succeed in her argument.

Feasibility of Enforcement

A court will not award specific performance unless it is feasible to enforce the injunction. Here, a court presumably has jurisdiction over the land and S. In addition, the court would be able to use its contempt power to force S to convey the land to B. Thus, the injunction is feasible to enforce.

Mutuality of Remedy/Performance

In the past, courts would not award specific performance if there was no mutuality of remedy (if the party asking for specific performance could not be made to specifically perform in the event of her breach). Courts today have modified this requirement so that they grant specific performance if it is possible to ensure mutuality of performance. In this case, mutuality of performance is possible since the court can require S to convey the deed to the property at the same time B tenders $100K to S.

No Equitable Defenses

Laches

B has not waited an unreasonable length of time to bring suit such that S can argue that he detrimentally relied on B's failure to bring suit. Accordingly, this is no defense.

Unclean Hands

S will assert that B has acted with unclean hands with regard to this particular transaction. He will point to B's statement in response to his request that he would like the property to remain undeveloped. S will claim the statement, while not explicitly false, was deceptive since it induced S into believing that B would not develop the property when, in fact, B planned all along to develop it as a resort. S will argue it was a misstatement by omission since B knew at the time the contract was formed that she would develop the property despite S's desire for her not to, yet she did not volunteer this information to S.

B may counter that her evasion was not an actual false statement and that she cannot be held responsible for whatever S may have interpreted her statement to mean beyond its actual literal meaning - that she did, in fact, understand that he'd like the property to remain undeveloped. B will argue that since there was no actual false statement, she does not have unclean hands and[,] thus, is fully entitled to specific performance.

If S is successful in making his argument, the court will deny B specific performance, and award her damages only.

Conclusion

A court will not award B specific performance of the contract since she had unclean hands with respect to the contract. Accordingly, it will grant her whatever damages can

be proven would be certain to occur. In this case, B will likely be entitled to the $30K that S will get from Tom that is in excess of the contract price they had agreed on. In addition, she can receive incidental damages and, in the unlikely event she can prove how much it would cost to obtain replacement property, she can receive any amount in excess of the contract price from S as well.

If, however, the court did award specific performance, it would require that S convey the 90 acres of land S actually owns to B. B would only have to pay $90K for the 90 acres. In addition, since it would cost B $15K to purchase the water rights from the true owner, B is also entitled to deduct this from the purchase price. Accordingly, if a court does award B specific performance, it will only require B to tender $75K to S in exchange for S's 90 acres of property.

S's Defense - Contract was Subject to a Condition

S will argue in his defense that he did not actually breach the contract because the contract was subject to a condition (an agreement not to develop the land). He'll argue this condition was not satisfied because he discovered that B fully intended to develop the land. Thus, he will argue, he was discharged from his own duty to perform under the contract by B's failure to abide by the condition and was free to terminate the contract.

B will successfully defend against this argument by proving that there was no explicit agreement to create a condition to the contract. The parol evidence rule doesn't apply to extrinsic evidence used to demonstrate the existence of a condition precedent to the contract. B will introduce the statement S made: "You know I want to make sure this property will still be used for farming and not developed." Next, she'll introduce her response: "Well, I certainly understand your feelings." Her response did not state that she would agree not to develop the property; thus, there is no condition precedent and B's argument that his duty to perform was discharged will not succeed.

February 1998
Question 5

Halfway, Inc. is a nonprofit organization, licensed by the state, to assist with the rehabilitation of former convicts. It owns a five-bedroom house in a residential neighborhood of well-maintained single-family homes. The house purchased by Halfway is on a parcel zoned for multiple family use, as is a small apartment building across the street. The remaining parcels in the area are zoned for single family use only.

For the past three months, Halfway has been using the building as a halfway house for parolees from state prison. At any given time, six to eight parolees live in the house while they look for employment and adjust to life in society. Most of the parolees are former sex and drug offenders. Such offenders have high recidivism rates. There is strict supervision by at least one resident director on the premises at all times. Halfway has successfully operated halfway houses in three other residential neighborhood locations in the state, attributing its success to the beneficial influences inherent in established residential environments.

Residents and property owners in the neighborhood have formed NASS, a neighborhood association that wants to prevent the halfway house from continuing to operate. NASS members are concerned about their safety, the safety of their children and their property values. While the halfway house was being renovated in preparation for the parolee program, one of Halfway's employees, not a parolee, assaulted a woman who lives in the neighborhood and is a NASS member.

NASS recently discovered that twenty years ago an injunction had issued and been recorded in the chain of title of Halfway's parcel forbidding the use of the property as a residence by unrelated persons living together. The injunction had issued because a group of college students, while living in the house, caused disturbances with late night parties and loud rock music.

NASS, on behalf of its members, has sued Halfway. In its complaint, NASS prays for: (1) an injunction against operation of a halfway house on the parcel Halfway has purchased on the grounds that the halfway house constitutes both a public and private nuisance and (2) a declaratory judgment that the twenty year old injunction **is an *in rem*** injunction that prevents Halfway from operating the halfway house.

What evidence must NASS produce to make *a prima facie* showing on each of its claims, what defenses might Halfway reasonably assert, and how should this court rule on each of NASS's claims? Discuss.

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ANSWER A TO QUESTION 5

NASS, a neighborhood association concerned about their safety, their children's safety and the value of their property, recently filed an action against Halfway, Inc., a nonprofit organization, licensed by the state to operate a halfway house to assist with the rehabilitation of former convicts. NASS' main objective is to have Halfway enjoined from operating a halfway house in their neighborhood claiming their presence constitutes both a public and private nuisance.

The defendants operate a halfway house which is located in a residential neighborhood. Although the majority of the neighborhood is zoned for single-family residences, the parcel which Halfway house is on and an apartment across the street are zoned for multiple family use so there is no zoning violation. However, the halfway house consists of five bedrooms and for the past three months have, at any given time, six to eight parolees living there while seeking employment and readjusting to life in society. In addition there is always at least one resident director on the premises to supervise the parolees.

Nuisance - In order to establish a prima facie showing of a nuisance plaintiffs must prove an intentional and unreasonable interference with the use and enjoyment of their property. For a public nuisance, plaintiffs must also prove their injury to them is different in kind and scope than the injuries to other members of the community.

Intentional Interference - while the defendants do not actually have to "intend" to interfere with plaintiffs use and enjoyment of their land, once defendant has been notified that such interference exists and continues his conduct regardless, intent is found.

Due to the fact that halfway house was established to help rehabilitate former convicts and that most of the parolees are former sex and drug offenders, NASS is concerned for their own safety and the safety of their children. In addition, they believe that the value of their property will decline due to the operation of the halfway house in their community. While this is a genuine concern, their potential "interference" with the use and enjoyment of their property is no different in kind than other residents in the adjoining neighborhoods, thereby precluding a claim of Public Nuisance. However, one of the NASS members was recently attacked. This incident might allow that particular member to assert a public nuisance (since her injury is different in kind than the community at large), however, it will not give the association and other residents in the neighborhood the right to a public nuisance claim.

With respect to private nuisance, if plaintiffs can show that due to the presence of the halfway house, they can no longer allow their children to play outside, they themselves are put in fear whenever they leave and return to their homes, thus depriving them of the use and enjoyment of the property, they might establish a private nuisance.

Balancing - In order to establish whether or not there is a nuisance, the courts will balance the utility of the conduct vs. the harm to the plaintiffs. Here, while the potential harm to the residents is a genuine concern, the facts indicate that halfway house has had a great deal of success in rehabilitating former convicts and attribute this to the environment of a neighborhood similar to the one NASS is trying to protect. Additionally, it has always been a public policy to try to "rehabilitate" our criminals -- this would be a very difficult task to accomplish if there was no place for them to go to while adjusting to life in society and attempting to obtain employment. While plaintiffs will argue that the danger is great, due to

the recent attack on one of its members, the attack was not done by one of the former convicts, but by one of the employees of halfway house.

Defendants will argue that the fears are unwarranted, that parolees are under strict supervision and that the attack on one member was not a result of the operation of the halfway home, that since the parolees are under strict supervision, the plaintiffs' fears are unwarranted and at the very least premature. The home is proper under the zoning laws and there has been no interference with the plaintiffs use and enjoyment of their property.

Conclusion - On balance, while the plaintiffs have a genuine concern, the defendants conduct most likely will not be considered as either a public or private nuisance depriving plaintiffs of the use and enjoyment of their property.

Injunction - for plaintiffs to prevail with the injunction, they must

show: 1. underlying cause of action (here tort theory of

nuisance);

2. Mutuality of remedy - primarily required at common law but courts now have basically abandoned. If following in this jurisdiction, plaintiffs will have a problem establishing mutuality of remedy.

3. Feasibility of degree - here there should be no problem since once enjoined, if the party continues the conduct enjoined, the court can hold them in contempt.

4. Inadequate remedy at law - here plaintiffs argument is for their own peace and safety, which no amount of damages can compensate them for, so that their legal remedy is inadequate. [However, where diminution in the value of the property is concerned, they may be able to obtain damages].

5. Balancing test - many courts will do a second balancing test looking at the utility of the conduct vs. the harm to plaintiffs. As stated above, the utility of defendants conduct is great in terms of public policy -- however it is not the type of conduct which may bring in jobs and other financial type benefits to the community. Yet the potential harm to the plaintiffs is also great in that their main purpose is purchase in this type of neighborhood was for the peace of mind this type of neighborhood somewhat insures.

Defenses to injunction are equitable - laches; unclean hands - which do not seen to pose a problem here.

Declaratory Judgment - 20 years ago an In Rem injunction which prevents Halfway from operating the halfway home on the premises.

Plaintiffs would like to have the court order that the injunction issued 20 years ago was In Rem (meaning against the property and not against the particular individuals residing there at the time). This would be very beneficial in that they would not have to prove nuisance and obtain a new injunction, and the defendants would be held in contempt if they didn't comply.

However, the injunction issued at that time was for different purposes and will probably not hold.

Defendants will argue that the previous injunction was against loud noise and late night parties. These actions are not the type of conduct plaintiffs are complaining about in the current action. Furthermore, over 20 years have passed and circumstances have changed.

ANSWER B TO QUESTION 5

NASS' CLAIMS, HALFWAY'S DEFENSES, AND HOW COURT

SHOULD RULE

I. Public Nuisance

A. NASS Claim,

To make out a claim for a public nuisance, NASS must show a (1) unreasonable interference (2) with the health, safety, or property rights (3) of the community. To be entitled to relief on this claim, NASS must also show an injury that is special to it, uncommon from the rest of the community.

1. Interference

Here, NASS (N) can assert that Halfway's (H) proposed halfway house will be an unreasonable interference because the house will contain parolees from state prison. At anytime, the house contains six to eight parolees who live in the house while they look for employment and adjust to life in society. This implies that the parolees are probably continuously loitering about the neighborhood, since they are not gainfully employed. Additionally, this gives the parolees additional time, day or night, to do whatever they please, including getting into trouble with the neighborhood. This clearly is unreasonable.

Additionally, N should show that most of the parolees are former sex and drug offenders, and such offenders have high recidivism rates. This clearly would also be an unreasonable interference - if one of the parolees acted on the neighborhood residents.

2. The Public Safety. Health, or Property Rights

NASS should assert that because of the unreasonable interference, the community's safety, the safety of their children and their property values all are in jeopardy. These rights are common to the community.

3. Special Injury

NASS could also assert that it has already sustained a special injury because a woman who lives in the neighborhood was assaulted during construction of H's house. The victim is also a NASS member.

B. H's Defenses

He should assert that the interference is not unreasonable because it has successfully operated halfway houses in three other residential neighborhoods in the state. It should also note that its success is due to the beneficial influence inherent in established residential environments. H should also assert that it has been in the neighborhood for 3 months and that there has been no criminal activity or interference of the kind complained of by NASS in the community that was committed by a parolee. It has been a peaceable co-existence with the parolee's for 3 months.

H should also show that it has put safeguards in place to ensure that the parolees do not go back to their life of crime or unreasonably interfere with the community. Specifically, there is strict supervision by at lease one resident director on the premises at all times.

H should also assert that the interference is not unreasonable because the

house was specifically zoned for multiple use. Additionally, its services benefit the public at large because it is rehabilitating parolees, who might otherwise revert back to their criminal ways without the assistance of H.

H should also assert that N has sustained no personal injury that is special from the community at large. The nuisance complained of is the housing of parolees in the neighborhood. The injury pointed to by NASS is the assault by a NASS employee. Thus, the injury is not related to the relief sought and is thus not special to allow the action.

C. The Injunction

NASS is seeking an injunction for the alleged public nuisance. To get an injunction it must show that legal damages are inadequate, that a property interest is implicated, that an injunction would be feasible, that the hardships balance in its favor and H has no defenses.

Legal damage would be inadequate to compensate for sexual or drug related offenses to the community. N can point to its property values as implicating a property interest. Also, because most courts now allow personal rights to be redressed by injunction, N could point to its safety and health needs of the community. An injunction would be feasible because the court could enjoin H's activities with a negative injunction.

As for hardships, they are normally not balanced when the conduct is intentional. But here, there really has been no injury or intentional conduct causing an interference. N would assert that its safety and welfare favor it but H could counter that it is doing good for society as **a** whole by rehabilitating parolees.

H could assert two defenses. The first is that N is barred by laches. Laches is a defense when a party, in equity, watches another party act to its detriment before seeking to enjoin the activity. Here, NASS was aware that H was renovating the house because one of its members was assaulted. Additionally, H has operated the house for three months before suit was brought. In the three months, H has settled into the house and begun operations. This was all done while N sat back and watched.

H can also assert its 1st Amendment rights to freedom of association, the association being the parolees.

Court's Ruling

Given the arguments addressed above, the court should rule that N is not entitled to an injunction for public nuisance. First, the interference (if there is one) is not unreasonable and does not affect the health and safety of the community. Additionally, N has sustained no private injury to have standing to maintain suit. Finally, N should be barred by laches because of its inequitable conduct and the balance of hardships in

favor of H.

11. Private Nuisance

In order to make out a claim for private nuisance, N must establish a substantial, unreasonable interference with the use and enjoyment of personal property. N would assert for the same reasons noted above that the interference by H is substantial and unreasonable.

- would respond in the same way but also point out that the interference must be substantial.
- would assert that there is no substantial interference here because there has actually been no interference at all.

N would assert that the use and enjoyment of property rights of its members are being infringed on for the same reasons noted above, that the health, safety and property interests of the community were being infringed on.

H would respond that there is no such interference with use and enjoyment as noted above and that the N members are able to use and enjoy their property as much as they had before.

The court should deny the private nuisance request for the same reasons as the public: no interference, and the same defenses and balance of hardship weigh in favor of H.

Old Injunction

The old injunction should not be applied against H. The old injunction was clearly not In Rem against the house and has expired. Looking at the language of the injunction, it was directed to a specific group of college kids. Also, the apartment across the street, zoned that way, shows there is no harm in unrelated persons living together.

This also infringes H's 1st Amendment right of association, which were not clearly advocated by the US Supreme Court when the old injunction issued. The house is also a successful endeavor for the benefit of society and thus the injunction should not issue. The old injunction also was a result of a specific injury with a particular set of facts. The injunction should not be used to prevent a different situation from continuing or operating.